Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

TA CHEN STAINLESS STEEL PIPE, LTD.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

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148 pp

QUESTION PRESENTED

Whether courts may expand the authority of the Department of Commerce to impose antidumping duties on imports beyond situations permitted by the statute in which Congress narrowed such authority to comply with the international agreements of the United States.

PARTIES TO THE PROCEEDING

Petitioner

Ta Chen Stainless Steel Pipe, Ltd. ("Ta Chen")

Respondent

United States

CORPORATE DISCLOSURE STATEMENT

Per Rule 29.6 of the Rules of this Court, petitioner Ta Chen Stainless Steel Pipe, Ltd. states the following:

Ta Chen Stainless Steel Pipe, Ltd. has no parent company. Ta Chen Stainless Steel Pipe, Ltd. is not publicly held, and there is no publicly held company that owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals -- in the Appendix ("App.") hereto at pages 1a-37a -- is reported at 298 F.3d 1330. The opinions of the U.S. Court of International Trade -- *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, No. 97-08-01344, 1999 Ct. Int'l Trade LEXIS 110 (Oct. 28, 1999) ("*Ta Chen I*") (App. 76a-115a) and *Ta Chen Stainless Steel Pipe, Inc. v. United States*, No. 97-08-01344, 2000 Ct. Int'l Trade LEXIS 107 (Aug. 25, 1999) ("*Ta Chen II*") (App. 38a - 56a) -- are unreported. The February 25, 2000 remand determination of the Department of Commerce (App. 57a-75a) -- i.e., *Certain Welded Steel Pipe from Taiwan, Final Results of Redetermination Pursuant to Court Remand* ("*DOC Remand Results*") -- is not published.

JURISDICTION

The judgment of the Federal Circuit was entered on August 1, 2002, and a timely petition for rehearing was denied on October 10, 2002. App.116a-117a. By letter dated January 8, 2003, the Chief Justice granted petitioner until January 18, 2003 (a Saturday) to file this petition. Since Monday January 20, 2003 is a national holiday and this Court is closed, this petition must be filed by Tuesday January 21, 2003 under this Court's rules. Jurisdiction in this Court is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND LEGISLATIVE HISTORY INVOLVED

The antidumping statute 19 U.S.C. § 1677e(b) states, in pertinent part:

> Adverse inferences. If the administering authority finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information . . . the authority, in reaching a decision, . . . may use an inference that is adverse to the interests of the party in selecting from among the facts otherwise available.

The antidumping statute 19 U.S.C. § 3512(d) also states, in pertinent part, that the Statement of Administrative Action ("*SAA*") is:

> an authoritative expression by the United States concerning the interpretation and application of the [WTO] Uruguay Round Agreements and this Act [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application.

The *SAA* states (H.R. Rep. No. 103-826(I), at 815 (1994)) that:

> repeating the basic provisions [of the U.S. antidumping statute, under the WTO Anti-Dumping Agreement,] national authorities must collect duties, if imposed, in appropriate amounts …not exceeding the dumping margin.

STATEMENT

This case involves an investigation under the U.S. antidumping statute. The statute authorizes the imposition of antidumping duties on imported merchandise that is sold in the United States at prices that are deemed at "less than fair value" (the dumping margin), if such imports cause or threaten to cause material injury to a domestic industry producing merchandise like that imported. 19 U.S.C. § 1673 (1999). The U.S. Department of Commerce ("DOC" or "Commerce" or "the Department") administers the statute. DOC is responsible for collecting data to enable the imposition of antidumping duties in appropriate cases.

The antidumping law provides DOC with certain authority to facilitate its ability to obtain that data. In particular, it allows DOC to draw an adverse evidentiary inference against a party that fails to cooperate adequately in providing requested data. The scope of that authority, however, is narrowly defined by statute. DOC may apply an adverse inference only if it finds that a party "failed to cooperate by not acting to the best of its ability to comply with a request for information" from DOC. 19 U.S.C. § 1677e(b). These statutory provisions, the international agreements that led to their adoption by Congress, and the Federal Circuit's failure to respect their limits, are the focus of this petition.

I. Chronology Of Key Events

Petitioner Ta Chen Stainless Steel Pipe, Ltd. ("Ta Chen"), with its U.S. subsidiary Ta Chen International, sells stainless steel pipe made in Taiwan in the U.S. market. Ta Chen had a U.S. customer named Sun Stainless, Inc., to

whom it last sold pipe in August 1994. App. 2a. At one time, a former minority shareholder of Ta Chen owned Sun, but he sold the company to new owners in July 1995. *Id.* at 2a-3a, 26a.

In 1992, certain U.S. pipe producers filed a petition with DOC alleging that Taiwan producers were selling pipe into the U.S. at prices that were at "less than fair value." After investigation by the DOC and a determination by the U.S. International Trade Commission ("ITC") that the imports caused the requisite injury to domestic producers, an antidumping order was issued applicable to the pipe sold by Ta Chen. App. 3a.

The antidumping order was subject to periodic administrative reviews by DOC pursuant to the antidumping statute. *Id.* In January 1994, DOC commenced an administrative review on imports during the 1992-93 period. Subsequently, DOC commenced two more reviews; the third review, which is the basis for this case and covers imports during the period of December 1994 to November 1995, began February 1996. *Id.*

During the first review (July 1994), U.S. producers alleged to DOC that Ta Chen was "affiliated" with Sun. If true, Sun's sales were potentially relevant to the investigation to determine the dumping margin. App. 21a. In fact, however, DOC could not have found that Sun was "affiliated" with Ta Chen at that time, given then agency practice that the law required current ownership of at least 5% of one party in another to find them to be related parties. App. 4a, 22a-23a. Thus, at the time of the U.S. producers' allegation, or indeed for several years thereafter, DOC did

not question Ta Chen as to its relationship with Sun, nor did DOC request Sun's resale data. *Id.*

In 1995, Congress amended the antidumping statute to broaden the definition of "affiliate" to include situations where one company has the potential to control another. App. 4a, 24a. In October 1996, for the first time, DOC requested that Ta Chen provide information on its relationship with Sun (but not Sun's resales of Ta Chen's product). *Id.*

In November 1999, DOC first specifically requested that Ta Chen provide data on Sun's resales as to Ta Chen's August 1994 sales to Sun. App. 5a, 19a, 24a-28a, 33a-34a, 58a-59a, 66a. The request was made over five years after Ta Chen had stopped selling pipe to Sun (in August 1994) and over four years after Ta Chen's former shareholder sold his ownership stake in Sun (in July 1995). Although Ta Chen and its counsel made repeated efforts to contact Sun's new owners and elicit their cooperation to obtain the information requested by DOC, the new owners of Sun refused to provide it, explaining that Sun no longer had operations in the U.S. and assembling the requested data would be unduly burdensome. App. 5a-6a, 28a-29a, 59a. Neither DOC nor the courts below have suggested anything more Ta Chen could have done to obtain the requested information. App. 6a, 10a-12a, 59a.

II. Course Of Proceedings Below

A. In its administrative review of 1994-95 imports, DOC imposed an adverse inference dumping margin on Ta Chen's sales to Sun, stating that Ta Chen did not act "to the best of its ability" to supply Sun's sales data in response to

DOC's November 1999 request. App. 58a-61a. DOC explained that Ta Chen should have "taken steps to obtain and preserve the relevant records" before DOC requested them because "Ta Chen had notice that its relationship with Sun in particular raised a question *with the Department* as to affiliation at least as early as *October 1996*", based on a DOC questionnaire issued to Ta Chen at that time asking about Ta Chen's relationship to Sun (though not requesting Sun's resale data). App. 29a & 66a (emphasis added). As noted above, October 1996 was long after any conceivable connection between Ta Chen and Sun ended.

Using the "adverse inferences" provision of the statute 19 U.S.C. § 1677e(b), DOC selected the single highest dumping margin found on Ta Chen's sales to customers other than Sun to calculate the dumping margin for sales to Sun. App. 6a, 62a. DOC said that it selected that margin to deter non-compliance with its request for information -- i.e., irrespective of whether the selected margin was aberrant or otherwise not representative of Ta Chen's selling practices, including as to the sales to which the selected margin was applied. App. 74a. In the alternative, DOC held that the selected margin was representative of Ta Chen's sales, based on an analysis where *non-price* factors were determinative, finding the actual prices unimportant to its analysis. App. 73a.

B. Ta Chen appealed the DOC decision to the U.S. Court of International Trade ("CIT"). The CIT affirmed. App. 38a-56a. The CIT said that "Ta Chen should have preserved Sun's information" because, "as early as *July 1994*, Ta Chen knew its relationship with Sun was at issue" because *U.S. producers* had called it to DOC's attention in the first review. App. 45a.

The CIT also rejected Ta Chen's objections that the selected adverse inference dumping margin applied to Ta Chen's sales to Sun was invalid because it was based on a single sale that did not correspond to the reality of Ta Chen's selling practices regarding the Sun sales. At the same time, the CIT rejected DOC's finding that the sale used to calculate the adverse inference dumping margin was representative on the basis of an analysis of *non-price* data; but instead affirmed DOC's decision on an analysis making *price* factors determinative, an analysis DOC had rejected. App. 53a.

C. Ta Chen appealed the CIT decision to the Federal Circuit. The Federal Circuit affirmed. App. 1a -37a. The court made no effort to justify its decision under the terms of 19 U.S.C. § 1677e(b). To the contrary, the court acknowledged that "it is true that a respondent to a Commerce inquiry only has an obligation to produce data requested by Commerce, see 19 U.S.C. § 1677e(b)." App 10a. At no point did the Federal Circuit suggest that Ta Chen had access to the Sun resale information after it was requested by Commerce. *Id.* But the court concluded that "it is reasonable in this case for Commerce to expect Ta Chen to preserve its records in the event that Commerce itself would request them" because the *U.S. producers* had raised Ta Chen's relationship with Sun in *1994* (at a time when the law clearly provided that Sun was not an affiliate of Ta Chen such that its resale data would be relevant). App. 4a, 10a-11a.

The court also affirmed the amount of the adverse inference dumping margin applied to Ta Chen's sales to Sun, explaining that "Commerce acts within its discretion so long

as the rate chosen has a relationship to the actual sales information available" -- i.e., the single sale with highest dumping margin to a customer other than Sun -- even if Commerce chooses unrepresentative sales "with an eye toward deterrence." App. 16a-17a. The Federal Circuit did not even consider -- i.e., viewing it as legally irrelevant -- if the record evidence as a whole indicated that DOC's selected adverse inference margin was aberrant and not representative as to the sales to which it was applied, as argued by Ta Chen.

Judge Gajarsa dissented, remarking that the "majority concludes that Commerce may penalize importers for failing to engage in divination." App. 20a The dissent emphasized that "the pertinent statutes authorize Commerce to impose an adverse inference only after an importer fails to comply to the best of his ability with a request for information" from Commerce, and clearly does not "authorize Commerce to impose an adverse inference on the grounds that an importer failed to predict a future request and take affirmative steps to obtain information before Commerce requested it." App. 19a. Noting that Ta Chen's relationship with Sun was long over before Commerce gave any indication that an affiliation with Sun existed under the new law, the dissenting judge disagreed with the majority that "it is reasonable for Commerce to expect Ta Chen to obtain and preserve Sun's records." App. 29a. "More importantly," he continued, "even were such an expectation reasonable, there is simply no statutory authority allowing Commerce to assume adverse facts against an importer for failing to predict what information Commerce might someday request." App. 34a.

Judge Gajarsa concluded by stating that the Federal Circuit majority's opinion had broad and damaging ramifications, giving "Commerce carte blanche to require

importers to gaze into their crystal balls, and to affirmatively obtain records that Commerce may never request, or may request years later under a subsequent change in the law. Imposing this requirement is both unreasonable and, more importantly, contrary to law." App. 37a.

REASONS TO GRANT THIS PETITION

Review is needed in this case because this Federal Circuit decision (a) expands agency powers well beyond those permitted by a key U.S. trade statute that Congress adopted to bring this country into compliance with its international obligations, and (b) increases greatly the burdens and risks on the trade community in conducting its affairs. Contrary to that statute and U.S. international obligations for which the statute was adopted to satisfy, the Federal Circuit condones antidumping duties (a) based on adverse inferences that are impermissibly imposed against parties who acted to the best of their ability to cooperate with a request for information from the administering authority and (b) that are imposed purely for punitive or deterrence purposes irrespective of the actual margin of dumping as to the sales to which the adverse inference is applied.

The antidumping law has a major impact on this nation's foreign commerce and its international relations. Because the Federal Circuit has exclusive jurisdiction to review cases under this law, circuit conflicts that would normally bring the law before this Court do not arise. More than twenty years have elapsed since this Court last considered an international trade case. During that period, the Federal Circuit has issued 116 decisions in such cases. As this Court has recognized in other areas of the law, such as patents and tax, it is appropriate for this Court to intervene

on occasion to review anomalous Federal Circuit decisions even though a conflict between the circuits will not exist due to the Federal Circuit's exclusive jurisdiction. *See, e.g., Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17 (1997); *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989).

I. The Federal Circuit Decision Gave The Department Of Commerce Authority That Congress Had Taken Away By Statute In Order To Bring This Country Into Compliance With Its International Obligations.

Two centuries ago, this Court held in *Alexander Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118 (1804), that, where possible, a statute must be construed to conform to the international obligations assumed by this country.[1] The Federal Circuit's decision negates revisions to the U.S. antidumping statute that Congress adopted to bring the United States into compliance with its international agreements.

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[1] *See also* Restatement (Third), Foreign Relations Law of the United States § 111 (1987) ("[c]ourts in the United States are bound to give effect to international law and to international agreements of the United States").

A. The Federal Circuit Decision Contravenes Revisions Congress Made To The Anti-Dumping Statute Per International Agreement That Adverse Inferences Are Only Permitted Against Those Who Did Not Act To The Best Of Their Ability To Comply With A Request For Information.

Under the 1995 amendments to the antidumping statute, incorporated in the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994), Congress stated that DOC may use adverse inferences only if a party fails to "cooperate by not acting to the best of its ability to comply with a request for information" from DOC. 19 U.S.C. § 1677e(b) (2000). Congress purposely changed the prior law -- i.e., 19 U.S.C. 1677e(c) (1979) -- that had allowed the agency to use adverse inferences (then called best information available) "whenever a party or any other person ... is unable to produce information..."

The *SAA* accompanying the URAA was prepared by the U.S. Trade Representative and other agencies of the Executive Branch involved in the actual negotiations of the international WTO Anti-Dumping Agreement as to permissible use of antidumping laws of WTO member countries.[2] The *SAA,* ratified by Congress in the URAA,[3]

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[2] H.R. Rep. No. 103-826(I), at 656, 868 & 870 (1994); *SAA*, *reprinted in* 1994 U.S.C.C.A.N. 4040.

[3] The *SAA* is "an authoritative expression by the United States concerning the interpretation and application of the [WTO] Uruguay Round Agreements and this Act [the URAA] in any

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sheds important and guiding light on the intentions of the negotiators of the WTO Anti-Dumping Agreement on this matter. The *SAA* states (at 868-70) that:

> In conformity with the WTO Antidumping Agreement, ... section 776(b) [of the new U.S. law] permits Commerce ... to draw an adverse inference where a party has not cooperated in a proceeding. A party is uncooperative if it has not acted to the best of its ability to comply with requests for necessary information [from the administering authority. The URAA] amends [the current U.S. statute] to implement these provisions in the Agreement.

One WTO dispute panel has already found that an administering authority's practice to apply adverse inferences beyond situations specifically authorized by the WTO Anti-Dumping Agreement -- i.e., in cases where a party fails to act to the best of its ability in response to a request for information from the administering authority -- a violation of the Agreement.[4] A WTO Appellate Body affirmed that the U.S. acted impermissibly when it applied adverse inferences against a party for failure to provide

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judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

[4] *WTO Dispute Panel Report on Argentina-Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WTO Panel Report, WT/DS 189/R, November 5, 2001 ¶ 6.55, published in *Bernan's Annotated Rep.*, Volume 35, at 11 (2002).

information not in that party's possession, but rather in the possession of an uncooperative affiliate reseller.[5] The violation of international obligations of this country is even more severe here where the reseller was not even an affiliate under the law at the time of the sales in issue or at the time of the DOC request.

The Federal Circuit in this case disregarded Congress' revision of the antidumping statute to bring this country into compliance with its international obligations. The Federal Circuit determined that it was "reasonable" to use adverse inferences against a party who cooperated to the best of its ability at the time of the DOC request, but failed to anticipate that DOC might request the information years after the sales in issue when the information was not available. App. 10a. The Federal Circuit found no fault in Ta Chen's efforts to comply with DOC's request when it was made. Still, the Federal Circuit condoned the use of adverse inferences though not permitted by the statute Congress enacted to comply with this country's WTO obligations.

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[5] *WTO Dispute Panel Report on United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WTO Appellate Body Report, WT/DS 184/AB/R, August 23, 2001, ¶¶ 97-110, as published in *Bernan's Annotated Rep.*, Volume 32, at 273 (2001).

B. The Federal Circuit Decision Impermissibly Condoned The Agency Position That Adverse Inference Dumping Margins May Be Imposed Purely For Punitive Or Deterrence Purposes, Even If They Bear No Relation To The Margin Of Dumping Of The Sales To Which They Are Applied.

The court of appeals' held that DOC may use any sale to determine the adverse facts available dumping margin, irrespective of whether that sale is probative of the dumping margin as to the sales to which it is applied – i.e., ignoring all other record evidence in this case. That holding violates the antidumping statute Congress adopted to bring the United States into compliance with its WTO obligations.

The URAA, effective January 1, 1995, codified the remedial nature of the antidumping statute in 19 U.S.C. § 1673d(b)(4)(A) (noting "the remedial effect of the antidumping duty order"). In particular, the antidumping statute requires DOC to impose antidumping duties on imported merchandise that is being sold in the United States at below fair value (the dumping margin), if the ITC has found those imports injure, or threaten to injure, a domestic (U.S.) industry. 19 U.S.C. § 1673 (1999). The antidumping duty that is imposed is the amount by which the price charged for the subject goods (after various adjustments) in the home market exceeds the price (after other adjustments) charged to unrelated customers for like goods in the United States (again, the dumping margin). 19 U.S.C. § 1673 &

1673e(a).[6] In other words, the statute is plainly remedial in purpose.

In adopting the amendments to U.S. law to conform to the WTO Agreements, Congress emphasized its statutory purpose to avoid situations where "use of [certain] sales would lead to irrational or unrepresentative results" in determining the actual amount of dumping. URAA, 103rd Cong., 2d Sess, Rept. 103-826, Part 1, Oct. 3, 1994 at 77. Congress specifically stated its purpose "to conform U.S. law more specifically to the provisions of the [WTO] Agreement." *Id.* The *SAA* states (at 815) that, "repeating the basic provisions" of the U.S. antidumping statute, under the WTO Anti-Dumping Agreement, "national authorities must collect duties, if imposed, in appropriate amounts ... not exceeding the dumping margin." Article 9.3 of the WTO Anti-Dumping Agreement states that the "amount of the antidumping duty shall not exceed the margin of dumping."

Commerce candidly acknowledges in this case that it disregards these statutory and WTO mandates, noting that it:

> Never determined that an adverse facts available margin should be reflective of a respondent's actual dumping margins. The purpose of applying adverse facts available is to induce respondents to cooperate with the Department's proceedings.

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[6] Section 1677b(a) of 19 U.S.C. also confirms that the antidumping statute is remedial, and not punitive (providing that "a fair comparison shall be made between the export price or constructed export price and normal value.")

App. 74a. The Federal Circuit upheld DOC's action on the ground that the agency used data for a single sale to determine the adverse inference dumping margin and thus no further inquiry was necessary. App. 16a-17a.

But the standard explicitly set forth by the WTO Agreement that Congress ratified in the URAA requires the determination of dumping margins based on all available record facts, not simply the selection of the dumping margin on a single sale without consideration of the record as a whole. The antidumping statute mandates that, in situations in which adverse inferences may be necessary, DOC "must make [its] determinations based on *all* the evidence of record, weighing the record evidence to determine that which is most probative of the issue under consideration" – i.e., the amount of dumping. *SAA* at 869 (emphasis added); S. Rep. No. 103-412, 2d Sess. at 87 (1994). This mandate also reflects the statutory requirement that DOC's antidumping decisions be supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(l). This Court holds that agency actions must be supported by substantial evidence, "when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view." *Universal Camera Corp. v. NLRB*, 340 U.S. 477, 488 (1951). The Federal Circuit's decision flouts the substantial evidence rule that envisions weighing the evidence of record as a whole, and is thus contrary to the statute and this Court's decisions.[7]

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[7] It is true that use of adverse facts available is an investigative tool designed to induce providing information and that a party should not get a more favorable result by not cooperating. *SAA* at 868; WTO Anti-Dumping Agreement, Annex II, ¶7. But those

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Congress, pursuant to U.S. international obligations, revised the antidumping statute to not allow the imposition of antidumping duties for penalty purposes. The Federal Circuit rule of law in this case allows DOC to impose antidumping duties for penalty purposes, contrary to both Congressional intent and U.S. international obligations.

II. The Issues Raised In This Petition Are Of Considerable Importance.

This seminal Federal Circuit decision has widespread ramifications.

First, a series of multilateral trade agreements, beginning with the General Agreement of Tariffs and Trade ("GATT") and now the WTO system have reduced tariff and non-tariff trade barriers, liberalized trade, and increased world prosperity and peace. Abuse of antidumping laws – i.e., to appease domestic protectionist interests and re-impose tariffs -- can be and is viewed by professional observers of the subject as a major threat worldwide to the important progress made in the last fifty years following the adoption of the GATT.[8]

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statutory and WTO principles do not mean that the statutory and WTO mandate to accurately calculate the dumping margin may be overridden for purely punitive anti-dumping duties.

[8] *See* David Palmeter, *The Antidumping Law: A Legal and Administrative Nontariff Barrier, in Down in the Dumps: Administration of the Unfair Trade Laws* 64, 69-70 (Richard Boltick & Robert Litan, eds. 1991). The international WTO

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In this regard, it is important to consider the interests of U.S. exporters who are subject to foreign antidumping measures. U.S. actions serve as a model for other countries in their own application of antidumping laws under the WTO Anti-Dumping Agreement. For this reason, the U.S. government itself emphasizes the importance of adhering to international trade rules:

> A rules-based system under the WTO governing international trade is in the national interest of the United States ... The system has worked to the benefit of the United States, providing a means to enforce U.S. rights and contributing to greater compliance by WTO Members ... A major concern [is] that U.S. exporters are treated fairly in anti-dumping cases. U.S. exporters are a frequent target of foreign antidumping proceedings, with over 100 investigations initiated against them since 1995.[9]

In the same vein, Congress stated in the recently enacted Section 2102 of the Trade Act of 2002, P.L. 107-147 sec. 2105(b)(3), 116 Stat. 933, 1016, that the overall trade objective of the United States is "to further strengthen the

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Uruguay Round fight to curb antidumping law excesses is described in I. M. Destler, *American Trade Politics* 240-44 (Inst for Int'l Econ. 3d ed. 1995).

9 Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body, Report to Congress Transmitted by the U.S. Secretary of Commerce at 1 & 15, Dec. 30, 2002.

system of international trading disciplines and procedures," including such trade remedies as antidumping measures. The *SAA* (at 807) emphasizes that the substantive and procedural rules of the WTO Anti-Dumping Agreement:

> ensures U.S. exporters fair treatment in foreign antidumping investigations [and that] *all* countries which become members of the [WTO] will be subject to the same antidumping rules [and to preclude] rewriting the terms of the Anti-Dumping Agreement under the guise of legal interpretation ... Article 1 sets forth the general principle that antidumping measures must be applied only under the circumstances provided for in Article VI of GATT 1994... (emphasis in original)

The Federal Circuit decision contravenes the U.S. antidumping statute that Congress adopted to comply with this country's international obligations under the WTO Anti-Dumping Agreement. The Federal Circuit decision thereby undermines both Congressional and Executive Branch efforts in the WTO to tighten disciplines on antidumping measures via firm adherence to a rule of law.

Second, never, until now, have the burdens and obligations created by this Federal Circuit decision been imposed on the trade community in the conduct of its business: A party has never before been subjected to adverse inferences for failure to anticipate that the law might change. No other party has been required to anticipate DOC's future views and thus collect and preserve information from another party just in case DOC wishes to expand its investigative horizons. Moreover, the mere allegations of a private party (as opposed to a request from the agency

administering the antidumping law) have never before been held to create obligations on parties in antidumping cases as to data collection and preservation, including from customers. Without statutory authority, the Federal Circuit has effectively deputized private parties as "attorneys general" in antidumping cases.

The burdens and risks generally created by the Federal Circuit's decision are well illustrated in this case. Ta Chen is being subjected to 30.9% antidumping import duties on sales in August 1994 because it failed to anticipate then that years later DOC antidumping law would change and DOC would request data in the files of one of Ta Chen's customers. Ta Chen is being punished for not taking steps to obtain and preserve the customer's data regarding costs and resales of product acquired from Ta Chen, which would ordinarily be regarded as confidential and would not lightly be given to the supplier.

Despite requests from the trade community, DOC has steadfastly refused to define when it will apply the new broad statutory definition of "affiliate" to hold, as it did here, that it needs customer resale data on the grounds that the supplier has a potential to control or affect the customers' resales. DOC, *Notice of Proposed Rulemaking*, 61 Fed. Reg. 7308, 7310 (1996) ("the Department appreciates the [trade community's] desire for greater guidance concerning the definition of 'control.' However, the Department does not believe that it is now in a position to" offer such guidance); DOC, *Anti-Dumping/Countervailing Duties (Final Rule)*, 62 Fed. Reg. 27296, 27297 (1997) (affirming the proposed regulations on this issue). DOC has said that it will tell parties its views in particular cases only after the fact. *Id.*

Under the Federal Circuit's decision, all of the subjects of an antidumping investigation may be exposed to adverse inferences for their possible failure to have looked into crystal balls and obtained customer resale data at some point in the past. In direct contravention of Congress's mandate, a party is now unable to protect itself against adverse inferences even if the party follows the statutory directive to act "to the best of its ability to comply with a request for information" from DOC, as required by 19 U.S.C. § 1677e(b).

CONCLUSION

This petition for a writ of certiorari should be granted to allow this Court to review a major Federal Circuit decision affecting an area of that court's unique and exclusive jurisdiction that has never been examined by this Court since the Federal Circuit was created.

Respectfully submitted,

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January 21, 2003

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 01-1048

TA CHEN STAINLESS STEEL PIPE, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Decided: August 1, 2002

DISPOSITION:
AFFIRMED.

COUNSEL:
Peter J. Koenig, Miller & Chevalier, of Washington, D.C., argued for plaintiff-appellant. With him on the brief were Joel Davidow, and Kristen S. Smith.

Mark L. Josephs, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, D.C., argued for defendant-appellee. With him on the brief were Stuart E. Schiffer, Acting Assistant Attorney General, David M. Cohen, Director, and Velta A. Melnbrencis, Assistant Director.

JUDGES:
Before MAYER, Chief Judge, GAJARSA and LINN, Circuit Judges. Opinion for the court filed by Circuit Judge LINN. Dissenting opinion filed by Circuit Judge GAJARSA.

OPINION:

LINN, Circuit Judge.

Ta Chen Stainless Steel Pipe, Ltd. ("Ta Chen") appeals a judgment of the United States Court of International Trade affirming a United States Department of Commerce ("Commerce") remand determination applying partial adverse facts available to certain Ta Chen sales of welded stainless steel pipe ("steel pipe") and setting the import duty at the highest available dumping margin. *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 2000 Ct. Intl. Trade LEXIS 107, No. 97-08-01344 (Ct. Int'l Trade Aug. 25, 2000) ("Ta Chen II"). Because Commerce's decision is supported by substantial evidence and is otherwise in accordance with the law, we affirm.

BACKGROUND

Ta Chen is a Taiwanese producer and exporter of steel pipe. Through August 1994, Ta Chen sold steel pipe through a U.S. distributor, Sun Stainless, Inc. ("Sun"). From September 1993 to July 1995, Sun was owned by Frank McClane, a former minority shareholder of Ta Chen, and managed by Ken Mayes, a former consultant to Ta Chen. Ta Chen had custody of Sun's signature stamp as well as unlimited access to Sun's accounts receivable, accounts payable, and inventory and pricing information. Ta Chen also participated in negotiations of Sun's sales of steel pipe. Ta Chen, however, had no equity ownership in Sun. On July 3, 1995, McClane sold 80% of Sun's stock to Picol

International ("Picol"), a foreign corporation, and the remaining 20% to Mr. Masaru Kimura, thereby fully divesting himself of ownership.

In 1992, certain U.S. producers of steel pipe ("petitioners") filed an antidumping petition with Commerce alleging that steel pipe imported from Taiwan was being sold domestically at a lower price than it was being sold under similar conditions in Taiwan. On January 18, 1994, Commerce initiated an administrative review of certain steel pipe imported from Taiwan covering a period from 1992 to 1993. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 59 Fed. Reg. 2593 (Dep't Commerce Jan. 18, 1994). On January 13, 1995, Commerce initiated a second review covering a period from 1993 to 1994. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 60 Fed. Reg. 3192 (Dep't Commerce Jan. 13, 1995). On February 1, 1996, Commerce initiated a third review covering a period from December 1, 1994, through November 30, 1995. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation* in Part, 61 Fed. Reg. 3670 (Dep't Commerce Feb. 1, 1996). The three reviews were conducted concurrently, and preliminary determinations for all three were published during the first half of 1997. See *Certain Welded Stainless Steel Pipe from Taiwan; Preliminary Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 26,776 (Dep't Commerce May 15, 1997) ("*Combined First and Second Review Preliminary Results*"); *Certain Welded Stainless Steel Pipe from Taiwan; Preliminary Results of Administrative Review*, 62 Fed. Reg. 1435 (Dep't Commerce Jan. 10, 1997) ("*Third Review Preliminary Results*"). The third review is the subject of this appeal.

During the first review, petitioners called Commerce's attention to Ta Chen's potential affiliation with Sun and

certain other parties under the then existing Tariff Act. See *Certain Welded Stainless Steel Pipe from Taiwan; Final Results of Administrative Review*, 64 Fed. Reg. 33,243, 33,244 (Dep't Commerce June 22, 1999) ("First and Second Review Final Results"); 19 U.S.C. § 1677(13) (1988). At that time, Ta Chen denied the allegations of affiliation and provided no information concerning its relationship with Sun. Ta Chen later argued before Commerce that it was not affiliated with Sun during the period of review because under the law at the time, foreign exporters were "affiliated" with their U.S. customers only if the exporter owned at least 5% of the customer. *First and Second Review Final Results*, 64 Fed. Reg. at 33244-45; see also 19 U.S.C. § 1677(13) (1988) (repealed by Pub. L. No. 103-465, Title II § 222(i)(2), Dec. 8, 1994, 108 Stat. 4876). Petitioners renewed their allegations in a submission filed with Commerce on July 12, 1995, and presented additional information regarding Ta Chen's potential affiliation with Sun. *First and Second Review Final Results*, 64 Fed. Reg. at 33,244-45. Ta Chen again denied the allegations. Id.

Effective January 1, 1995, Congress modified U.S. trade law and broadened the definition of "affiliated persons." See Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994); compare 19 U.S.C. § 1677(33) (2000), with 19 U.S.C. § 1677(13) (1988). Under the new definition, if an exporter has operational control over its U.S. customer, the exporter is affiliated regardless of ownership. See 19 U.S.C. § 1677(33). The third antidumping review of Ta Chen was initiated under this broadened standard. As part of the third review, Commerce issued a general questionnaire to Ta Chen concerning affiliated importers, giving Ta Chen notice of the broader definition of affiliated parties. Ta Chen's response to the questionnaire, however, did not include information about Sun. *First and Second Review Final Results*, 64 Fed. Reg. at

33,244. Commerce then issued a supplemental questionnaire to Ta Chen specifically requesting information regarding its affiliation with Sun. In response, Ta Chen provided some of the requested information-Sun's 1995 financial statement, for example-but did not provide any information regarding sales data. Id.; *Third Review Preliminary Results*, 62 Fed. Reg. at 1436.

In reviewing the information provided, Commerce determined that Ta Chen was affiliated with Sun during the third review period. *Certain Welded Stainless Steel Pipe from Taiwan; Final Results of Administrative Review*, 62 Fed. Reg. 37,543, 37,544 (Dep't Commerce July 14, 1997) ("*Third Review Final Results*"); see also First and Second Review Final Results, 64 Fed. Reg. at 33,244. Commerce further determined that Ta Chen had failed to act to the best of its ability to provide information on Sun's U.S. sales and consequently would be subject to the highest dumping margin from the facts otherwise available. *Third Review Final Results*, 62 Fed. Reg. at 37,544. Ta Chen appealed to the Court of International Trade. *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 23 C.I.T. 804 (Ct. Int'l Trade 1999) ("*Ta Chen* I"). The court affirmed the determination that Ta Chen and Sun were affiliated but reversed and remanded the determination to apply adverse facts available. Id. at 818, 821. The court found that Commerce violated 19 U.S.C. § 1677m(d) by not providing adequate notice to Ta Chen that it was required to furnish Sun's U.S. sales data. Id. at 821. The court remanded for further review by Commerce after Ta Chen had been given an adequate opportunity to provide Sun's sales data. Id.

During the remand review, Commerce issued another questionnaire seeking Sun's sales data. Ta Chen forwarded the questionnaire to Sun, asked Sun to complete it, and offered "any and all assistance" in answering it. On November 25, 1999, Sun's counsel notified Ta Chen that

Sun would not cooperate with the Commerce inquiry because it had been closed since 1996 and had no operations in the United States, making a response too burdensome and costly. Sun's counsel stated, however, that he would urge Sun to reconsider. After Ta Chen successfully sought two extensions of time to submit the requested information to Commerce, Sun's counsel notified Ta Chen that Sun still would not cooperate with the request. The following day Ta Chen informed Commerce that further attempts to retrieve the Sun data would be "futile."

Upon remand, Commerce found that "Ta Chen has withheld or failed to provide the information requested regarding Sun's U.S. sales despite repeated notification of the deficiency...." *Certain Welded Stainless Steel Pipe from Taiwan, Final Results of Redetermination* Pursuant to Court Remand, 1999 Ct. Intl. Trade LEXIS 110 at *45, No. 97-08-01344 (Dep't Commerce Feb. 25, 2000) (*"Remand Results"*). Commerce further found that Ta Chen "failed to act to the best of its ability in responding to the Department's request for information regarding Sun's U.S. sales." 1999 Ct. Intl. Trade LEXIS 110 at *58. Without the requested sales data and pursuant to 19 U.S.C. § 1677e(b), Commerce applied facts otherwise available and used an adverse inference to apply the highest available dumping margin. Id., 1999 Ct. Intl. Trade LEXIS 110 at *60. Commerce calculated that margin at 30.95%. Id., 1999 Ct. Intl. Trade LEXIS 110 at *60. On appeal, the Court of International Trade affirmed the Commerce remand determination. The court found substantial evidence that Ta Chen had not complied to the best of its ability with Commerce's request for information on Sun's sales. *Ta Chen II*, 2000 Ct. Intl. Trade LEXIS 107 at *3. The court noted that while Ta Chen may have had reason to argue it was not affiliated with Sun under the changing definitions of "affiliated party," it was nevertheless on notice as early as July 1994 that its

relationship with Sun was at issue and that Sun's sales might be later construed as constructed export price sales. Id., 2000 Ct. Intl. Trade LEXIS 107 at *11. The court, therefore, found that Ta Chen "could have, and should have, preserved its information on Sun's sales in order to provide full information for the Department." Id., 2000 Ct. Intl. Trade LEXIS 107 at *11.

The court also affirmed Commerce's application of a 30.95% dumping margin, noting that the adverse facts available involved a price and quantity neither unusually high nor unusually low and drawn from sales of a normal product. Id , 2000 Ct. Intl. Trade LEXIS 107 at *16. The court then concluded that the rate chosen by Commerce was not aberrant, as Ta Chen contended, but rather was indicative of Ta Chen's sales. Id., 2000 Ct. Intl. Trade LEXIS 107 at *18. The court added that "the methodology chosen by Commerce was the only way to apply an adverse inference in this case, while still using [Ta Chen's] own information." Id., 2000 Ct. Intl. Trade LEXIS 107 at *25.

On appeal to this court, Ta Chen challenges both (1) the decision by Commerce to impose partial adverse facts available on Ta Chen and (2) the selection of 30.95% as the dumping margin. The government argues that the court properly sustained Commerce's application of partial adverse facts available based on Ta Chen's failure to cooperate to the best of its ability. The government further argues that the 30.95% dumping margin is both supported by substantial evidence and otherwise in accordance with the law. This court has jurisdiction under 28 U.S.C. § 1295(a)(5)

DISCUSSION

A. STANDARD OF REVIEW

We review a decision of the Court of International Trade evaluating an antidumping determination by Commerce by reapplying the statutory standard of review that the Court of International Trade applied in reviewing the administrative record. *Mitsubishi Heavy Indus., Ltd. v. United States,* 275 F.3d 1056, 1060 (Fed. Cir. 2001). Commerce's special expertise in administering the anti-dumping law entitles its decisions to deference from the courts. See, e.g., *Micron Tech., Inc. v. United States,* 117 F.3d 1386, 1394 (Fed. Cir. 1997); *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995); see also *Chevron USA, Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). We will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000); *Micron Tech.*, 117 F.3d at 1393. "Substantial evidence" has been defined as "more than a mere scintilla," as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB,* 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938). To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that "fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States,* 744 F.2d 1556, 1562 (Fed. Cir. 1984).

Ta Chen's contention that the imposition of adverse facts available was an "abuse of discretion" is a misstatement of the proper standard of review. While certain appeals from antidumping duty proceedings follow the "arbitrary, capricious, abuse of discretion" standard, this appeal reviews a final determination by Commerce under 19 U.S.C. § 1675 other than a determination reviewable under 19 U.S.C.

§ 1516a(a)(1). See 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). Therefore, we review the decision under the substantial evidence standard of section 1516a(b)(1)(B)(i) as opposed to the "arbitrary, capricious, abuse of discretion" standard of section 1516a(b)(1)(A).

B. IMPOSITION OF PARTIAL ADVERSE FACTS AVAILABLE

Ta Chen argues three distinct errors in Commerce's imposition of partial adverse facts available. First, it argues that the record does not support the factual finding that it was affiliated with Sun. Second, it contends that the Court of International Trade impermissibly affirmed Commerce's decision on grounds not invoked by Commerce. Finally, it argues that Commerce violated 19 U.S.C. § 1677m by not notifying Ta Chen of deficiencies in its information gathering efforts before imposing partial adverse facts available. The government responds by arguing that the Court of International Trade properly affirmed Commerce's decision because Commerce's decision to impose partial adverse facts available is supported by substantial evidence of record. The government also contends that the Court of International Trade did not affirm Commerce's decision on alternative grounds, but decided the case on the same grounds invoked by the agency. Finally, the government argues that Commerce complied with 19 U.S.C. § 1677m because Commerce was not required to notify Ta Chen that its complete failure to respond was deemed non-responsive.

1. Ta Chen's Affiliation with Sun

Ta Chen argues that Commerce erroneously imposed partial adverse facts available upon Ta Chen based on "unsupported speculation" that Ta Chen was affiliated with Sun's successor, Picol. We disagree with that

characterization of Commerce's decision. Substantial evidence supports the factual determination that Ta Chen and Sun were affiliated during the relevant period of review. "Affiliated persons" includes any group in which one person controls another. See 19 U.S.C. § 1677(33)(G) (2000). "[A] person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." Id. Commerce's factual determination is supported by evidence that: (1) Sun was owned by a former minority shareholder of Ta Chen and managed by a former Ta Chen consultant, and (2) Ta Chen had custody of Sun's signature stamp and full access to Sun's accounting and pricing information.

Contrary to Ta Chen's arguments, Commerce did not impose partial adverse facts available upon Ta Chen because Ta Chen was related to Picol in 1999. Rather, Commerce did so because Ta Chen was affiliated with Sun during the period of review and then subsequently failed to act to the best of its ability to provide information on Sun's U.S. sales. Ta Chen bore the burden of creating an accurate record. See *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993) ("The burden of production [belongs] to the party in possession of the necessary information."). Ta Chen was on notice as early as 1994 that its relationship with Sun was raised before Commerce by the petitioners in the first review period. While it is true that a respondent to a Commerce inquiry only has an obligation to produce data requested by Commerce, see 19 U.S.C. § 1677e(b), it is reasonable in this case for Commerce to expect Ta Chen to preserve its records in the event that Commerce itself would request them, which it actually did in October 1996. When Sun was sold without preserving the records of Sun's sales, Ta Chen bore the risk that Commerce would request the sales data previously alleged to be evidence of dumping activity. Thus, we will not disturb Commerce's decision to

apply partial adverse facts available on Ta Chen because of its former affiliation with Sun and its subsequent inability to procure Sun's sales data.

2. The Basis for the Court of International Trade's Decision

Ta Chen argues that the Court of International Trade impermissibly affirmed Commerce's decision on grounds not articulated by Commerce. We disagree. Ta Chen notes that a "fundamental rule of administrative law [is] that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 91 L. Ed. 1995, 67 S. Ct. 1575 (1947); but see; *Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir. 1998) (noting that a court may affirm on a new ground if the new ground is not a determination which the agency alone is authorized to make); *Killip v. Office of Pers. Mgmt.*, 991 F.2d 1564, 1568-69 (Fed. Cir. 1993) (noting that a court may affirm on a different interpretation of a statute or regulation "when upholding the Board's decision does not depend upon making a determination of fact not previously made by the Board"). Here, however, the Court of International Trade did not affirm Commerce's decision on alternative grounds. In its Remand Results, Commerce explained its decision to use an adverse inference against Ta Chen as follows:

It has already been established that Ta Chen had operational control over Sun and had access to its sales and pricing data. Ta Chen knew that Sun's U.S. sales were an issue both in the administrative review and in this litigation and that there was a possibility that Ta Chen would be requested to provide those records once again.... Accordingly, Ta Chen should have taken steps to obtain and preserve the relevant records. It cannot now rely on the fact

that Sun is no longer in business to justify its failure to produce the necessary documentation.

Remand Results, 2000 Ct. Intl. Trade LEXIS 107 at *9. The Court of International Trade opinion reflects that it approved the grounds invoked by Commerce:

Ta Chen does not and cannot contest the fact it had operational control of Sun. The [Court of International Trade previously] found Commerce's affiliation finding supported by substantial evidence due to the numerous connections between Ta Chen and Sun. It is reasonable for the Department to conclude that this operational control gave Ta Chen access to Sun's records. This conclusion is further supported by the fact that Ta Chen was able to provide other confidential records from Sun, such as Sun's federal income tax records. It is also reasonable for Commerce to expect Ta Chen to maintain any relevant records pending the final outcome of the administrative review. In order to comply to the best of its ability, Ta Chen should have preserved Sun's information in the event that its sales were classified as [constructed export price sales].

Ta Chen II, 2000 Ct. Intl. Trade LEXIS 107 at *9. (internal citations omitted).

Ta Chen compares one sentence in Ta Chen II to one sentence in the Remand Results for the proposition that the Court of International Trade affirmed the Commerce decision on alternative grounds. In the Remand Results, Commerce noted that "Ta Chen had notice that its relationship with Sun in particular, raised a question with the Department as to affiliation at least as early as October 1996." *Remand Results,* 2000 Ct. Intl. Trade LEXIS 107 at *10 The Court of International Trade opinion states that "as early as July 1994, Ta Chen knew its relationship with Sun was at issue because the petitioners had called it to the Department's attention in the first administrative review." *Ta Chen II,* 2000 Ct. Intl. Trade LEXIS 107 at *10. While

the different opinions cite different dates regarding when Ta Chen knew that its relationship with Sun was an issue before Commerce, the Court of International Trade's reasoning is not inconsistent with the grounds invoked by Commerce. Commerce found that Ta Chen was on notice "at least as early as October 1996," while the Court of International Trade pinned the date as July 1994. Those time periods are not mutually exclusive. Moreover, reliance on Ta Chen's notification in October 1996-the same year that Picol closed-would be sufficient to uphold Commerce's decision. Because both Commerce and the Court of International Trade considered the notice of affiliation as just one factor in their conclusion that Ta Chen failed to act to the best of its ability to provide information on Sun's U.S. sales, we conclude that the Court of International Trade did not deviate from its duty to review only the decision made by Commerce.

3. Commerce's Compliance With 19 U.S.C. § 1677m

Ta Chen argues that Commerce violated 19 U.S.C. § 1677m by failing "to notify Ta Chen of any deficiencies in Ta Chen's efforts to induce Picol's cooperation" before imposing partial adverse facts available. We disagree with Ta Chen's interpretation of the statute. The pertinent subsection, entitled "Deficient submissions," provides in part:

> If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity

> to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle.

19 U.S.C. § 1677m(d) (2000). The Court of International Trade in Ta Chen I remanded Commerce's first attempt to impose adverse facts available upon Ta Chen because Commerce failed to comply with the statute by not providing adequate notice to Ta Chen that it was required to furnish Sun's sales data. *Ta Chen I, 23* C.I.T. at 821. Upon remand, Commerce issued a questionnaire to Ta Chen specifically seeking Sun's sales data. Following issuance of the specific questionnaire and the Remand Results, the Court of International Trade in Ta Chen II found no violation of the statute. *Ta Chen II,* 2000 Ct. Intl. Trade LEXIS 107.

We find no error in the Court of International Trade's application of the statute to the facts in this case. After being given a specific chance to get Sun's sales data, Ta Chen completely failed to provide Commerce the data. Commerce granted Ta Chen two extensions of time to try to get the information, but Ta Chen's counsel eventually informed Commerce that further efforts would be "futile." Under such circumstances where, following an opportunity to gather more information, a party informs Commerce that it will not provide the information requested, Commerce is not required to give another formal notice that the complete failure to respond does not comply with the request. Ta Chen knew that "the nature of the deficiency" was its complete failure to respond. The statute only applies when a "response to a request" is deemed to not comply. A failure to respond is not the same as a "response" as required by the statute. Therefore, Commerce was under no statutory duty to formally tell Ta Chen that its failure to respond was deficient.

C. SELECTION OF THE 30.95% DUMPING MARGIN

Ta Chen argues that the 30.95% dumping margin was unsupported by substantial evidence and otherwise not in accordance with the law for several distinct reasons. Specifically, Ta Chen contends that (1) the margin selected was aberrant and not representative, and (2) Commerce impermissibly selected the high margin solely for deterrence. The government argues that Commerce properly derived the 30.95% dumping margin from Ta Chen sales during the period of review and corroborated the rate by comparing the relevant sale to Ta Chen's other sales in terms of price, quantity and product.

1. The Factual Basis for the Selected Dumping Margin

As this court recognized in *F.Lii De Cecco di Filippo Fara S. Martino S.p.A. v. United States,* 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("De Cecco"), the anti-dumping statute leaves much to agency discretion in making anti-dumping determinations. See also *Smith-Corona Group v. United States,* 713 F.2d 1568, 1571 (Fed. Cir. 1983) ("The Secretary has broad discretion in executing the [anti-dumping] law."). In the case of uncooperative respondents, the discretion granted by the statute appears to be particularly great, allowing Commerce to select among an enumeration of secondary sources as a basis for its adverse factual inferences. See 19 U.S.C. § 1677e(b) (2000). In cases in which the respondent fails to provide Commerce with the most recent pricing data, it is within Commerce's discretion to presume that the highest prior margin reflects the current margins. See *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1190 (Fed. Cir. 1990).

It is undisputed that Ta Chen made a sale with a 30.95% dumping margin. Ta Chen argues that the selected sale

represented only 0.04% of Ta Chen's sales during the period of review and was thus aberrant. Ta Chen cites De Cecco for the proposition that Commerce may not select an aberrant dumping margin when applying adverse facts available upon a respondent. De Cecco is distinguishable from this case. In De Cecco, the Court of International Trade rejected Commerce's application of a 46.67% dumping margin because that margin was "thoroughly discredited" and uncorroborated by Commerce's own investigation. *De Cecco,* 216 F.3d at 1032. Here, the 30.95% dumping margin is corroborated by actual sales data, and Ta Chen admits that it is reflective of some, albeit a small portion, of Ta Chen's actual sales. So long as the data is corroborated, Commerce acts within its discretion when choosing which sources and facts it will rely on to support an adverse inference. Id.

2. The Motivation Behind the Selection of the Dumping Margin

Ta Chen also argues that Commerce selected the 30.95% dumping margin solely for deterrence, contrary to this court's holding in *D & L Supply Co. v. United States,* 113 F.3d 1220 (Fed. Cir. 1997). In D & L Supply, a Chinese exporter of iron castings was subject to several administrative reviews of Commerce dumping orders. The exporter cooperated with Commerce from 1987 through 1990 by answering Commerce's antidumping questionnaires. For the 1989-90 review, Commerce calculated a 92.74% dumping margin. While Commerce was still conducting the administrative review for 1989-90, it initiated an administrative review for 1990-91. That year, the exporter did not cooperate with Commerce's investigation. Without the actual sales data for 1990-91, Commerce selected a dumping margin using the best information available ("BIA") rate, which was the precursor to the current "adverse inference" from "facts otherwise available" rule. Commerce

used the 1989-90 rate of 92.74%, as it was the highest antidumping duty rate from any prior administrative review. Id. at 1221-22.

Upon a challenge in the Court of International Trade, the court found that the rate for the 1989-90 review was erroneous and remanded the cases for both years. Commerce then recalculated the rate for 1989-90, but nevertheless used the 92.74% rate for the 1990-91 period under the BIA rule. Commerce argued to this court that it could use a subsequently invalidated dumping margin as the basis for calculating the BIA rate because the BIA rate is supposed to be sufficiently high to induce respondents to cooperate with Commerce's dumping investigations. This court reversed, holding that "information that has conclusively been determined to be inaccurate does not qualify as the 'best information' under any test...." Id. at 1223. This court further held that Commerce could not select a rate based solely on Commerce's interest in inducing foreign exporters to cooperate with Commerce's investigations. Rather, the rate must have some relationship to commercial practices in the particular industry. Id. at 1223-24.

This case is distinguishable from D & L Supply. Here, unlike the exporter in D & L Supply, the dumping margin selected by Commerce was corroborated by Ta Chen's sales data. While Commerce may have chosen the 30.95% rate with an eye toward deterrence, Commerce acts within its discretion so long as the rate chosen has a relationship to the actual sales information available. Since D & L Supply, this court recognized that Commerce may consider deterrence when selecting an adverse inference dumping margin.

It is clear from Congress's imposition of the corroboration requirement in 19 U.S.C. § 1677e(c) that it intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with

some built-in increase intended as a deterrent to non-compliance. Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin. Obviously a higher adverse margin creates a stronger deterrent, but Congress tempered deterrent value with the corroboration requirement. It could only have done so to prevent the petition rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to overreach reality in seeking to maximize deterrence.

De Cecco, 216 F.3d at 1032. Because Commerce selected a dumping margin within the range of Ta Chen's actual sales data, we cannot conclude that Commerce "overreached reality." Thus, we will not disturb Commerce's selection of the 30.95% dumping margin.

CONCLUSION

Commerce's decision is supported by substantial evidence and is otherwise in accordance with the law. Commerce properly decided to apply partial adverse facts available upon Ta Chen for its failure to preserve Sun's sales data. Furthermore, Commerce acted within its discretion when it selected the highest available dumping margin reflected in the actual sales data before it. Therefore, we affirm the decision of the Court of International Trade.

AFFIRMED

DISSENT BY:
GAJARSA

DISSENT:

GAJARSA, Circuit Judge, dissenting.

I respectfully dissent. The decision of the United States Department of Commerce ("Commerce") is not in accordance with law. I would therefore reverse the decision of the Court of International Trade ("CIT"), which affirmed Commerce's decision. In affirming the CIT's judgment, the panel majority holds that Commerce was authorized to impose adverse facts against Ta Chen because Ta Chen failed to furnish Commerce with the United States sales data of another company, one of its former distributors, Sun Stainless, Inc. ("Sun"). When Commerce specifically requested that Ta Chen provide Sun's sales data, on November 9, 1999, Sun had been sold to a foreign corporation, and had ceased conducting business in the United States. See *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 2000 Ct. Intl. Trade LEXIS 107, No. 97-08-01344, 2000 WL 1225799, at *1 (Ct. Int'l Trade Aug. 25, 2000) ("*Ta Chen II*"). According to the majority, Ta Chen "bore the risk" of this outcome because Ta Chen failed to obtain and preserve Sun's resale data before Commerce ever requested it. Ante at 10. The majority reaches this determination despite the fact that the pertinent statutes authorize Commerce to impose an adverse inference only after an importer fails to comply to the best of its ability with a request for information, 19 U.S.C. § 1677e(b) (2000), and only after Commerce has provided the importer "with an opportunity to remedy or explain the deficiency," 19 U.S.C. § 1677m(d) (2000). The majority concludes that Commerce

may penalize importers for failure to engage in divination. I disagree with this conclusion and the reasoning from which it materializes.

Section 1677e(b) authorizes Commerce to assess an importer's response to a request for information. In response to a request by Commerce, importers must use their best efforts to provide the requested information. Commerce may impose an adverse inference only if an importer fails to respond with best efforts, 19 U.S.C. § 1677e(b) (2000), and fails to remedy or explain the deficiency, 19 U.S.C. § 1677m(d). Neither statute authorizes Commerce to impose an adverse inference on the grounds that an importer failed to predict a future request and take affirmative steps to obtain information before Commerce requested it. But this is precisely what Commerce did--impermissibly--to Ta Chen. See *FAG Italia S.p.A. v. United States,* 291 F.3d 806, 816 (Fed. Cir. 2002) (holding that the absence of a statutory prohibition cannot serve as a source of Commerce's authority in antidumping cases).

A careful review of the sequence of events demonstrates that Commerce exceeded the scope of its statutory authority by imposing adverse facts against Ta Chen. In 1992, domestic stainless steel pipe producers ("the petitioners") filed an antidumping petition with Commerce. The petitioners alleged that certain welded stainless steel pipe from Taiwan was being "dumped," or sold to United States customers at less than fair value. Commerce investigated. It determined that welded stainless steel pipe from Taiwan was being sold at less than fair value, and issued an antidumping order. *Certain Welded Stainless Steel Pipe from Taiwan,* 57 Fed. Reg. 62,300 (Dep't Commerce Dec. 30, 1992) (amended final determination and antidumping duty order). Commerce initiated three administrative reviews covering three separate periods: June 1992 to November 1993 ("the first review period"), December 1993 to November 1994

("the second review period"), and December 1994 to November 1995 ("the third review period").

In December 1995, when Commerce published notice of the opportunity to request an administrative review for the dumping order for the third review period, Ta Chen requested a review. See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation, 60 Fed. Reg. 62,070, 62,071 (Dep't Commerce Dec. 4, 1995). The third administrative review period, extending from December 1994 to November 1995, is at issue in this appeal. Ta Chen made no sales to Sun during this period. In fact, Ta Chen made no sales to Sun after August 1994; however, certain of Ta Chen's sales to Sun were included in the third review period because Ta Chen shipped merchandise to Sun in the United States during that time frame. *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 23 C.I.T. 804, 97-08-01344, 1 999 WL 1 001194, at *2 n.3 (1999) (*"Ta Chen I"*).

In 1994, in proceedings pertaining to the first administrative review, the petitioners represented to Commerce that Ta Chen and Sun were potentially affiliated. Ta Chen II, at *3. Affiliation is significant because, although dumping margins are ordinarily calculated with respect to the difference in price between what a foreign exporter charges in its home market and the price it charges in the United States, § 1677(33) of Title 19 of the United States Code includes certain affiliates in the statutory definition of "exporter." The price at which such affiliates resell the merchandise in the United States constitutes the constructive export price, and is used to calculate the exporter's dumping margin. See 19 U.S.C. § 1677a(a) - (b) (2000). Thus, if an exporter such as Ta Chen sells a product to an affiliate at an inflated price, the exporter will be held accountable for dumping if the affiliate charges less-than-fair-value upon resale.

For the first two review periods, the petitioners alleged affiliation. Ta Chen denied affiliation, and Commerce neither questioned Ta Chen regarding its affiliation with Sun nor requested Sun's resale data. During those first two review periods, Ta Chen owned no equity in Sun. Under Commerce's then-existing interpretation of the statute applicable at that time, a finding that a party was sufficiently affiliated with an exporter to warrant use of that party's sales price as the constructive export price required equity ownership. Consequently, (although Commerce later changed its position) under Commerce's interpretation of the relevant statute during the first two review periods, Ta Chen and Sun were not affiliated. See *Ta Chen Stainless Steel Pipe, Ltd., v. United States,* 2001 Ct. Intl. Trade LEXIS 150, No. 99-07-00446, 2001 WL 1574603, at *2-3 (Ct. Int'l Trade Dec. 10, 2001) ("Ta Chen IV") (explaining that Commerce previously interpreted 19 U.S.C. § 1677(13) (1988) to require equity ownership for an affiliate relationship, and holding that Commerce was free to change its interpretation subject to the requirements that it explain the reason for its change in position and that its new position must be consistent with the statute); see also *Ta Chen Stainless Steel Pipe, Ltd. v. United States,* 2001 Ct. Intl. Trade LEXIS 104, 99-07-00446, 2001 WL 915254, at *5-6 (Ct. Int'l Trade Aug. 14, 2001) (holding that although the previous statute permits examination of factors other than equity ownership, Commerce must explain the reason for its departure from past practice, which required equity ownership for affiliation, and remanding to provide Commerce an opportunity to explain the reason for its departure).

During the third period of review, the statute regarding affiliation changed. Congress enacted the Uruguay Round Agreements Act (URAA), which became effective on January 1, 1995, one month into the third review period. The URAA broadened the circumstances under which the

dumping margins of exporters would be determined based upon the constructive export price of their United States affiliates. See 19 U.S.C. § 1677(33)(g) (2000) (providing that control is sufficient to render parties "affiliated," and that "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person"). The scope of § 1677(33)(g) appears broader than the pre-URAA statute because control may exist without equity ownership; however, Commerce had interpreted the pre-URAA statute to require equity ownership even though that statutory language was also susceptible to a broader definition. Thus, when the URAA initially became effective one month into the third review period, Customs' interpretation of the meaning of "affiliated parties" had not yet been promulgated and it was as of yet unclear how the agency would interpret the new statutory standard.

Two and a half years after the URAA became effective, Commerce issued a final rule codifying the agency's interpretation of "control," sufficient to render an entity an "affiliated" under the URAA. See 19 C.F.R. § 351.102 (2000). Under Commerce's interpretation, as codified in § 351.102, "corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships," will not provide a basis for finding affiliation based on operational control, "unless the relationship has the potential to impact decisions concerning the production, pricing or cost of the subject merchandise." Id. This regulation did not become effective until July 1, 1997, almost two years after the end of the third review period. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,417 (Dep't Commerce May 19, 1997) (final rules). For administrative reviews such as the third review period at issue, which were initiated after the URAA became effective but prior to the effective date of the rules,

Commerce stated that the regulation would "serve as a restatement" of its interpretation of the requirements of the URAA.

Commerce determined that during the third review period, Sun met its new interpretation of an "affiliated person" under the URAA. But it was not until January 10, 1997, that Commerce informed Ta Chen of this determination. In fact, Commerce failed to inform Ta Chen that it considered Sun an affiliate during the third period of review, or that it might consider Sun an affiliate during the third period of review, until after Ta Chen's affiliation with Sun unquestionably ended.

On February 13, 1996, Commerce first issued Ta Chen a general questionnaire regarding affiliated importers. This questionnaire quoted the newly enacted statutory definition of "affiliated persons." It did not, however, offer additional guidance regarding Commerce's interpretation of the scope of this statutory standard, nor did the questionnaire refer to Sun. Ta Chen's response listed other companies as affiliates, but did not include Sun.

On October 22, 1996, Commerce first requested information about Sun, in particular. Commerce issued a supplemental questionnaire requesting that Ta Chen "please explain in detail your relationship, past and present, with all entities known as [Sun]." The panel majority states that in response to this questionnaire, Ta Chen "did not provide any information regarding sales data." Ante at 4. This statement implies that Commerce's supplemental questionnaire requested Sun's sales data. That implication is clearly erroneous. The supplemental questionnaire made no such request. Indeed, as the Court of International Trade noted, Commerce "never specifically requested this [sales] information," prior to its first attempt to impose adverse facts against Ta Chen. *Ta Chen I* 1999 Ct. Intl. Trade LEXIS 110 at *40.

Moreover, after receiving Ta Chen's response to the first supplemental questionnaire, Commerce apparently issued a second supplemental questionnaire on December 24, 1996. Id. 1999 Ct. Intl. Trade LEXIS 110 at *41. The CIT found that in this second supplemental questionnaire, Commerce "specifically told Ta Chen ... that it had not yet decided how to classify Ta Chen's US sales." Id. Commerce failed to ask specifically for Sun's U.S. sales data in this questionnaire, despite issuing preliminary results two weeks later, on January 10, 1997, in which Commerce determined that Sun was an affiliate.

Commerce issued both supplemental questionnaires after the deadline for Ta Chen to submit unsolicited factual information. Id. Commerce failed, in either questionnaire, specifically to request Sun's sales data. In fact, the CIT stated that Commerce "appears to have tried to avoid giving Ta Chen a belated chance to amend." Id. Because Commerce failed to notify Ta Chen that the agency considered Sun an affiliate, the CIT reversed Commerce's imposition of adverse facts and remanded the matter to give Ta Chen "an opportunity to remedy or explain the deficiency" pursuant to 19 U.S.C. § 1677m(d). *Ta Chen I* 1999 Ct. Intl. Trade LEXIS 110 at *46. (stating that "Commerce has an obligation to make the questions affected by affiliation issues clear, in light of its own recognition that affiliation is a complex concept").

Thus, Commerce did not make clear to Ta Chen from the outset of the third administrative review that it considered Sun an affiliate, or even a potential affiliate, under the new statutory and regulatory definition. Although I agree with the panel majority and the CIT that substantial evidence supports Commerce's determination that Sun and Ta Chen were affiliated within the meaning of § 1677(33)(G) for the early part of the third review period, I do not agree that any statutory or regulatory authority authorizes the

imposition of an adverse inference against Ta Chen for Ta Chen's failure to predict that Commerce would reach this determination. See *Ta Chen I* 1999 Ct. Intl. Trade LEXIS 110 at *46 ("In this case Ta Chen had a good basis to argue that it did not control Sun and it made that argument to Commerce."). For the first seven months of the third review period, from December 1994 to July 1995, a former minority shareholder of Ta Chen, Frank McClane, owned Sun. During this time, Ta Chen had custody of Sun's signature stamp, and access to its accounts receivable and payable, inventory, and pricing information. Ta Chen also participated in negotiations of Sun's sales of steel pipe during this time. From this, a reasonable fact-finder could infer that Ta Chen exercised influence sufficient to constitute "control" over Sun's U.S. pricing.

Had Commerce requested Sun's sales data from Ta Chen during this period of affiliation, Ta Chen would have had to produce it or suffer the imposition of an adverse inference. It is unreasonable, however, to assume that if an affiliation exists at one time, it necessarily continues indefinitely. Cf. *AK Steel Corp. v. United States,* 192 F.3d 1367, 1376 (Fed. Cir. 1999) (reversing imposition of countervailing duties because although Korean government exercised the requisite control to benefit its steel industry at one time, "Commerce has not pointed to evidence from which it is reasonable to infer that the government's control continued into the period of investigation"). In this case, the affiliation ended. It ended before Commerce ever requested Sun's resale data from Ta Chen.

On July 3, 1995, with almost six months remaining in the third period of review, McClane sold a controlling interest in Sun to a foreign corporation, Picol International ("Picol"). *Ta Chen II* 2000 Ct. Intl. Trade LEXIS 107 at *7. Commerce did not publish a notice of initiation for review in this case until February 1, 1996, almost seven months after

Sun was sold and its affiliation with Ta Chen was severed. See *Ta Chen I* 1999 Ct. Intl. Trade LEXIS 110 at *41. After Commerce issued the initial questionnaire and the two supplemental questionnaires described above--none of which specifically requested Sun's sales information despite the new but potentially inapplicable statutory definition of affiliates--Commerce issued preliminary results for the third review period in which it determined that Sun and Ta Chen were affiliated. Commerce then determined that Ta Chen had failed to act to the best of its ability to provide information on Sun's U.S. sales, and imposed the highest dumping margin from facts otherwise available for those sales.

Ta Chen appealed. On appeal, the CIT affirmed the finding of affiliation. *Ta Chen I* 1999 Ct. Intl. Trade 110 at *37 ("The court finds that Commerce's determination that Ta Chen controlled Sun is supported by substantial evidence."). The court remanded, however, because it found that Commerce erred in imposing adverse facts without providing adequate notice that Commerce would classify Ta Chen's sales to Sun as constructive export price sales. Id. 1999 Ct. Intl. Trade LEXIS 110 at *38. According to the court, Commerce failed to satisfy its "statutory obligation to provide respondents with a chance to remedy deficient submissions," id. (citing 19 U.S.C. § 1677m(d) (1994)), because Commerce never specifically requested Sun's resale data, and, by the time Ta Chen learned that Commerce would classify Ta Chen and Sun as affiliates, the time to submit unsolicited information had passed, id. The court explained that:

> If a respondent reasonably believes it is not affiliated with its reseller ... then it has a reason not to submit information on the subject reseller's U.S. sales until Commerce tells the respondent that it wants the information on the particular reseller or

> until Commerce's questions are clear enough that the respondent knows what it should submit. In this situation where a new statute was not fully explained and Commerce suspected that it would make a finding of affiliation between the importer and the U.S. reseller, it should have placed the respondent on notice, specifically requested information on that reseller's U.S. sales, and requested any other information necessary to the [constructive export price] calculation. If Commerce wishes to place the full burden of error of an affiliation assessment on the respondent, at a minimum it must make that clear, otherwise this is simply another instance of error which respondents must have an opportunity to correct under 19 U.S.C. § 1677m(d).
>
> Id. 1999 Ct. Intl. Trade LEXIS 110 at *46-47.

On remand, Commerce specifically requested Sun's resale data for the first time. This request occurred on November 9, 1999, more than four years after the former minority shareholder in Ta Chen had sold Sun to Picol. Ta Chen forwarded Commerce's request for Sun's sales data to Picol, but Picol declined to provide Sun's sales data. In a letter dated November 25, 1999, Picol's attorney stated that "Sun was closed on September 30, 1998" and no longer conducted business in the United States. The letter stated that because answering Commerce requests is burdensome and costly, his client would not cooperate with Commerce's inquiry. Ta Chen requested that Picol reconsider answering Commerce's request, and submitted a response to Commerce explaining that Sun had undergone a subsequent buyout after McClane sold it in 1995 and requesting an extension "in the hope that we hear back a more positive response from Sun." Commerce granted Ta Chen two extensions of time. On December 8, 1999, the day after Commerce granted the

second extension, Ta Chen forwarded Commerce a second letter from Picol's attorney. That letter states: "My client advises me today that he will not respond to the [Commerce] questionnaire for the same reason as I indicated to you in my prior letter dated November 25, 1999." At that point, Ta Chen informed Commerce that "further pressing on this matter appears to be futile."

Commerce concluded that Ta Chen had failed to comply to the best of its ability in providing the requested Sun sales data because Ta Chen failed to provide the data itself. Commerce did not inform Ta Chen of any insufficiency in the efforts Ta Chen made to comply with the request after receiving it. Rather, Commerce concluded that Ta Chen should have "taken steps to obtain and preserve the relevant records" before Commerce requested them. *Certain Welded Stainless Steel Pipe from Taiwan, Final Results of Redetermination Pursuant to Court Remand*, No. 97-08-01344, slip op. 99-117 at 4 (Dep't Commerce Feb. 25, 2000) ("*Remand Results*"). Commerce concluded that Ta Chen should have taken these affirmative steps in anticipation of a potential future request because "Ta Chen had notice that its relationship with Sun in particular, raised a question with the Department as to affiliation at least as early as October 1996." Id. at 9.

Commerce's determination was contrary to law. By October 1996--the date on which the agency reasoned that Ta Chen had notice that it should preserve Sun's sales information --Sun had already been sold to Picol. The record is devoid of evidence to support an inference that Sun and Ta Chen were affiliated after that sale. Nor does it contain evidence suggesting that Ta Chen had any access to Sun's resale data in October 1996, or in November 1999 when Commerce first specifically requested it. Nevertheless, on remand, Commerce imposed adverse facts against Ta Chen in calculating the applicable dumping margin.

Ta Chen appealed to the CIT for the second time. This time, the court affirmed Commerce's determination in its entirety. See generally Ta Chen II. In the prior appeal, the CIT held that Commerce acted contrary to law by failing to notify Ta Chen that it was accountable for producing Sun's resale data. This time, however, the court held that Ta Chen could be held accountable for failing to produce the data because "as early as July 1994, Ta Chen knew its relationship with Sun was at issue because the petitioners had called it to the Department's attention in the first administrative review." *Ta Chen II* 2000 Ct. Intl. Trade LEXIS 107 at *10. Therefore, the CIT affirmed Commerce's determination that Ta Chen failed to act to the best of its ability in responding to Commerce's information request, not because of any insufficiency in Ta Chen's response to the request once it issued, but because "in order to comply to the best of its ability, Ta Chen should have preserved Sun's information in the event that its sales were classified as [constructive export price sales]." Id. (emphasis added).

The CIT reached this conclusion despite a complete lack of evidence suggesting that Ta Chen ever possessed that information to begin with. Commerce appears to have recognized this; it held that Ta Chen's efforts were deficient because Ta Chen failed to "obtain and preserve" Sun's sales data. Remand Results at 4 (emphasis added). Thus, the CIT affirmed Commerce's determination only by diverging from the crucial facts as Commerce found them, in violation of *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 91 L. Ed. 1995, 67 S. Ct. 1575 (1947).

Next, despite concluding in the previous appeal that Commerce erred in failing to follow its statutory mandate to provide Ta Chen with the chance to remedy deficiencies in its response, this time the CIT determined that Commerce was under no obligation to afford Ta Chen a chance to

remedy the deficiency. *Ta Chen II* 2000 Ct. Intl. Trade LEXIS 107 at *14. The court held that Commerce need not provide Ta Chen with the chance to remedy the deficiency in its response. This is so, it concluded, because § 1677m(d) is inapplicable in remand proceedings "where time is of the essence," and because the chance to remedy errors would have made no difference; part of Ta Chen's deficiency was that it "could have done more to preserve the information on Sun's U.S. sales when it clearly had control of the information." Id.

The CIT erred in affirming Commerce's determination, as does the panel majority. Commerce's imposition of adverse facts was contrary to law. The CIT reached a contrary conclusion by impermissibly reading the applicable statutes. It issued a decision that contravenes both the law and the reasoning by which the court was guided in Ta Chen I. Consequently, on appeal, this court should have reversed and remanded. But rather than analyzing the pertinent statutory language to determine whether Commerce acted within the bounds of its statutory authority which it did not the panel majority skips the technicalities of statutory interpretation, and affirms on the basis that "it is reasonable in this case for Commerce to expect Ta Chen to preserve its records in the event that Commerce itself would request them...." Ante at 10. Grave error infects this determination at every turn.

The majority begins by noting that Commerce imposed adverse facts against Ta Chen because "Ta Chen was affiliated with Sun during the period of review and then subsequently failed to act to the best of its ability to provide information on Sun's U.S. sales." Ante at 9 (emphasis added). But as we shall see, the record contains no evidence of any failure on the part of Ta Chen subsequent to the period of review. It certainly contains no evidence of any failure on the part of Ta Chen subsequent to Commerce's

request for Sun's resale data. To the contrary, the majority's conclusion necessarily rests on the assumption that Ta Chen should have obtained and preserved Sun's resale data before Sun was sold. The sale to Picol occurred on July 3, 1995, six months before the end of the period of review, more than one year before Commerce determined that Ta Chen was on notice that it might request Sun's resale data, and more than four years before any evidence of record reflects a specific request by Commerce for this data. There is no statutory basis for imposing on Ta Chen a duty to obtain and preserve records prior to a request for information by Commerce.

Next, the majority determines that "Ta Chen bore the burden of creating an accurate record." Ante at 9. In support of this proposition, the majority cites *Zenith Electronics Corp. v. United States,* 988 F.2d 1573, 1583 (Fed. Cir. 1993), in which this court stated that the burden of production rests on "the party in possession of the necessary information." (Emphasis added.). But no evidence of record demonstrates that Ta Chen ever possessed Sun's U.S. resale data. Although Ta Chen could have been held accountable for obtaining that information from Sun during the period of affiliation, it is that period and that period alone during which the notion of constructive possession could reasonably apply. The law simply does not require companies to succeed in obtaining information from non-affiliates, over which, by statutory definition, they lack control. For non-affiliates, exporters' best efforts may fall short of obtaining cooperation.

Commerce therefore erred in concluding that "the requested data relates to a period when Ta Chen and Sun were readily sharing the subject information.... In this situation, it is reasonable to expect Ta Chen to work with Sun's new owners to obtain the new information." *Remand Results,* 2000 Ct. Intl. Trade LEXIS at *8. To the contrary, although the evidence of affiliation is sufficient to

demonstrate that Ta Chen could have obtained Sun's sales records during at least part of the third review period, the record is devoid of evidence suggesting that Ta Chen actually did so. Unless Commerce can demonstrate that Ta Chen was affiliated with Sun after Commerce requested Sun's sales information, then Commerce is free to expect Ta Chen to attempt to obtain the information from Sun's new owners, but Commerce is not free to impose adverse facts against Ta Chen if Sun's new owners refuse to cooperate. Rather, Commerce must identify any deficiencies in Ta Chen's efforts to persuade Sun to cooperate The agency must also afford Ta Chen the chance to remedy such deficiencies before it may impose adverse facts available.

Finally, despite noting that "a respondent to a Commerce inquiry only has an obligation to produce data requested by Commerce," ante at 10 (citing § 1677e(b)), the panel majority concludes that "it is reasonable in this case for Commerce to expect Ta Chen to preserve its records in the event that Commerce itself would request them, which it actually did in October 1996," id. (emphasis added). But it is Sun's records, not Ta Chen's, that Ta Chen is being faulted for not producing. I disagree that it is reasonable for Commerce to expect Ta Chen to obtain and preserve Sun's records. For six months during 1995 Ta Chen and Sun arguably met a newly adopted statutory definition of affiliation. Commerce did not clarify its interpretation of this admittedly complex statutory provision until issuing final rules in 1997. Although the petitioners had alleged that Ta Chen and Sun were affiliated during earlier review periods, Commerce failed to question Ta Chen about the potential affiliation. In fact, in the second supplemental questionnaire issued by Commerce two weeks before it initially determined that Sun's resale price would constitute Ta Chen's constructive export price, Commerce informed Ta Chen that the agency had not yet determined how it would

classify Ta Chen's sales. As between Ta Chen and Commerce, it is reasonable to place the burden on Commerce to inform Ta Chen that its interpretation of impending legislation may lead it to request information that it had previously not requested.

Reason does not, it seems to me, support the majority's decision to affirm Commerce's imposition of the requirement that Ta Chen actively obtain and preserve records in response to a request that Commerce might (or might not) someday make. This is particularly so where, in response to the petitioners' allegations in 1994 and the enactment of the URAA, Commerce easily could have made clear that it might consider Sun an affiliate, and that Ta Chen should therefore take steps to obtain and preserve Sun's sales data.

More importantly, even were such an expectation reasonable, there is simply no statutory authority allowing Commerce to assume adverse facts against an importer for failing to predict what information Commerce might someday request. See *FAG Italia, S.p.A.*, 291 F.3d at 816-19 (holding the absence of a statutory prohibition cannot be a source of agency authority and that Commerce lacks authority to conduct two and four-year duty absorption inquiries for transition orders due to the absence of statutory authorization). The statute on which Commerce relied, § 1677e(b), requires importers to respond to requests by Commerce to the best of their abilities. Commerce may impose adverse facts only where a party fails to "cooperate by not acting to the best of its ability to comply with a request for information" from Commerce. 19 U.S.C. § 1677e(b) (2000) (emphasis added). The statute does not require importers to take active measures to acquire or preserve information prior to such a request. Nor does the statute authorize Commerce to impose adverse facts based upon the consequences of legitimate business transactions

that occur prior to a request. In this case, until Commerce notified Ta Chen that it might deem Sun an affiliate and requested that Ta Chen obtain and provide Sun's sales data, Ta Chen had no obligation to obtain and preserve that information.

Moreover, the rationale for the statute is "to provide respondents with an incentive to cooperate." *F.Lii DeCecco Di Filippo Fara S. Martino S.p.A. v. United States,* 216 F.3d 1027, 1032 (Fed. Cir. 2000). This purpose is not served by allowing Commerce to impose adverse facts available based on an exporter's failure to preserve information that has become unavailable by the time Commerce requests it. One cannot fail to comply with a non-existent request. The existence of § 1677m(d), which affords respondents a chance to remedy deficiencies in their responses, also confirms the interpretation that the duty to respond with best efforts to a request made pursuant to § 1677e(b) arises in response to requests by Commerce, not prior to them.

Finally, Commerce violated § 1677m(d) by failing to notify Ta Chen of the nature of the deficiency in its response to the request for Sun's resale data. Although Ta Chen responded to Commerce's request by informing Commerce of Ta Chen's attempts to obtain Sun's records from Picol, Commerce concluded that Ta Chen had failed to use its best efforts in response to Commerce's request for Sun's resale data, and therefore determined that it would impose adverse facts against Ta Chen without promptly informing Ta Chen "of the nature of the deficiency," and without providing Ta Chen with "an opportunity to remedy or explain the deficiency." 19 U.S.C. § 1677m(d)(2000).

Contrary to the Court of Internal Trade's conclusion, nothing in the text of § 1677m(d) precludes it from applying in the context of remand proceedings. Remand occurs when some aspect of an antidumping determination by Commerce has been inadequate. It would be strange indeed if Congress

had intended to authorize the CIT to remand a determination for failure to comply with § 1677m(d), only to have Commerce fail to comply again, but escape the consequences of so doing because the failure occurred on remand. Had Congress meant to exclude application of § 1677m(d) from remand proceedings, it simply would have said so.

In fact, the panel majority does not even address this aspect of the CIT's determination. I interpret the opinion, therefore, as holding § 1677m(d) inapplicable on the facts of this case, not in remand proceedings generally. The conclusion that Commerce satisfied the requirements of § 1677m(d) because Ta Chen provided no "response to a request" but rather engaged in a "complete failure to respond" is belied by the majority's recognition that Ta Chen responded to Commerce's request by, among other things, informing Commerce that further efforts to obtain the information from Picol would be futile.

The evidence of record indicates that Ta Chen attempted to comply with Commerce's request to provide Sun's resale data once Commerce made that request. Commerce is not authorized to hold Ta Chen accountable for failing to predict and take affirmative steps to execute that request, which came over three years after the alleged affiliation between Ta Chen and Sun ended. Commerce is authorized to require Ta Chen to respond to the best of its present ability with a request. Commerce lacks authority to deem a response deficient based on the notion that Ta Chen should have affirmatively acted to "obtain and preserve" another company's records before Commerce requested them.

In short, the Court of International Trade got it right in Ta Chen I:

> If Commerce wishes to place the full burden of error of an affiliation assessment on the respondent, at a minimum it must make that clear, otherwise this is simply another instance of error which

respondents must have an opportunity to correct under 19 U.S.C. § 1677m(d).

Ta Chen I, 1999 Ct. Intl. Trade LEXIS 110 at *47. If Commerce wishes to require all importers to take active steps to obtain sales records of any U.S. distributors who may later be deemed affiliates, it must promulgate a regulation pursuant to statutory authority. Having failed to do so, Commerce may not automatically hold Ta Chen accountable for failing to obtain records of another company with which it was formerly affiliated. It must assess Ta Chen's efforts in light of the relationship in existence once Commerce made its request.

The imposition of adverse facts and the resulting dumping margin should be vacated and remanded. On remand, Commerce should be instructed to comply with § 1677m(d) by explaining to Ta Chen what additional efforts Commerce expects Ta Chen to take to obtain its former affiliate's records. The panel majority's decision instead to affirm gives Commerce carte blanche to require importers to gaze into their crystal balls, and to affirmatively obtain records that Commerce may never request, or may request years later under a subsequent change in the law. Imposing this requirement is both unreasonable and, more importantly, contrary to law. I therefore respectfully dissent.

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF INTERNATIONAL TRADE

TA CHEN STAINLESS STEEL PIPE, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

Court No. 97-08-01344

Dated: August 25, 2000

DISPOSITION:
Commerce remand determination affirmed.

COUNSEL:
Ablondi, Foster, Sobin & Davidow, p.c. (Joel Davidow and Peter Koenig) for plaintiff.

David W. Ogden, Assistant Attorney General, David M. Cohen, Director, Velta A. Melnbrencis, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Mark L. Josephs), Cindy G. Buys, Office of the General Counsel, United States Department of Commerce, of counsel, for defendant.

JUDGES:
Jane A. Restani, Judge of the United States Court of International Trade.

OPINION:

Public Version

OPINION

RESTANI, Judge: On October 28, 1999, the court remanded the final results of the Department of Commerce, International Trade Administration ("Commerce" or "the Department") in Certain Welded Stainless Steel Pipe from Taiwan, *62 Fed. Reg. 37,543* (Dep't Commerce 1997) (final results of admin. rev.) [hereinafter "Final Results"]. See *Ta Chen Stainless Steel Pipe, Ltd. v. United States, 1999 Ct. Intl. Trade LEXIS 110, No. 97-08-01344, 1999 WL 1001194* (Ct. Int'l Trade Oct. 28, 1999). Familiarity with the court's earlier opinion is presumed.

Commerce issued its remand determination on February 25, 2000. See *Final Results of Redetermination Pursuant to Court Remand: Ta Chen Stainless Steel Pipe, Ltd. v. United States,* Court No. 97-08-01344 [hereinafter "Remand Results" or "RR"]. Ta Chen contests the Department's application of adverse facts available and selection of the adverse margin in the Remand Results.[1]

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[1] Avesta Sheffield Inc., Damascus Tube Division, Damascus-Bishop Tube Co., and United Steelworkers of America (AFL-CIO/CLC), defendant-intervenors as to Ta Chen's Rule 56.2 motion, filed a stipulation of dismissal pursuant to USCIT Rule 41(a)(1)(B) and no longer appear as defendant-intervenors in this case. See *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, No.

(footnote continued on next page)

Standard of Review

In reviewing final determinations in antidumping duty investigations, the court shall hold unlawful any agency determination found unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

Background

A. Ta Chen's Affiliation with Sun Stainless, Inc.

In the Final Results, Commerce found that Ta Chen was affiliated with one of its U.S. distributors, Sun Stainless, Inc. ("Sun"), by virtue of Ta Chen's control over Sun, pursuant to 19 U.S.C. § 1677(33)(G) (1994). *Final Results, 62 Fed. Reg. at 37,549-50.* Because of Ta Chen's affiliation with this U.S. distributor, Commerce determined that Ta Chen had constructed export price ("CEP") sales during the period of review ("POR"). Because Ta Chen had not provided data on Sun's U.S. sales, the record did not contain the information necessary to calculate CEP. Commerce determined that Ta Chen failed to comply to the best of its ability in providing Sun's U.S. sales information. Id. at 37,552-53. Therefore, Commerce applied partial adverse facts available for Sun's U.S. sales. Id.

The court held that Commerce's determination that Ta Chen controlled Sun was supported by substantial evidence. *Ta Chen,* 1999 WL 1001194 at *11. The court found, however, that Commerce had failed to provide Ta Chen with sufficient notice of its determination that Ta Chen controlled Sun, and that the Department had never specifically

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(footnote continued from previous page)
97-08-01344 (Ct. Int'l Trade Mar. 3, 2000) (stipulation of dismissal).

requested the information on Sun's U.S. sales. Id. at * 12. Therefore, the court held that Commerce had failed to comply with its statutory obligation under 19 U.S.C. § 1677m(d) (1994) by failing to provide the respondent with notice of a deficient submission before applying facts available. Id. The court remanded the Final Results for Commerce to request Sun's U.S. sales information from Ta Chen. Id. at *14.

On November 9, 1999, Commerce issued a supplemental questionnaire to Ta Chen requesting information on Sun's U.S. sales in order to calculate CEP. RR at 2. Ta Chen contacted Picol Enterprises, Inc. ("Picol") for this information. Letters (Nov. 30, 1999), at 5, P.R. Doc. 1216, Def.'s Remand App., Tab 4, at 5. Sun's owner, Frank McLane, had sold Sun to Picol International and Masaru Kimura in July 1995. Ta Chen's Response to Petitioner's Comments (Dec. 20, 1996), at 12-14 & Ex. 3, C.R. Doc. 14, Pl.'s Prop. App. to 56.2 motion, Tab B, at 12-14 & Ex. 3. In response to its inquiry, Ta Chen received a letter dated November 25, 1999, from Picol Sun's counsel stating that it would not cooperate with the Department's inquiry because the company had closed on September 30, 1996. Letters, at 6, Def.'s Remand App., Tab 4, at 6. Picol Sun's counsel stated that it no longer maintained any business operations in the United States and that it would be burdensome for Picol Sun to respond to the request. Id. Picol Sun's counsel did state that he would ask his client to reconsider. Id. On November 30, 1999, Ta Chen requested an extension of time in which to provide the Sun information, which the Department granted. RR at 2. On December 7, 1999, Ta Chen requested another extension, but the next day it forwarded the Department a letter from Picol Sun's counsel stating that it would not respond to the Department's questionnaire for the reasons stated in the November 25, 1999 letter. Letters (Dec. 8, 1999), at 2, P.R. Doc. 1218,

Def.'s Remand App., Tab 7, at 2. Without the information on Sun's U.S. sales, Commerce did not have the information needed to calculate CEP.

Commerce concluded that because Ta Chen had withheld or failed to provide the information requested, it would apply facts otherwise available pursuant to 19 U.S.C. § 1677e(a) (1994). RR at 3. Commerce further concluded that Ta Chen had failed to comply to the best its ability in providing the information, and that an adverse inference pursuant to 19 U.S.C. § 1677e(b) was warranted for the Sun sales. Id. at 3-4. In calculating a partial adverse facts available margin, Commerce "assigned the highest calculated margin calculated for these final remand results to be applied to Ta Chen's sales to Sun." Id. at 5-6. The sale with the highest dumping margin was 30.95 percent, which Commerce used to recalculate the margin of 2.60 percent for Ta Chen's sales during the POR. Id. at 14-15. Ta Chen challenges the remand determination, contesting the application of adverse facts available and the selection of the margin.

B. Alleged Commissions to Anderson

In its motion for judgment on the agency record, Ta Chen challenged the Department's finding that Ta Chen had failed to report commissions to a U.S. customer, Anderson Alloys. In the Final Results, Commerce had applied partial adverse facts available to Ta Chen's sales to Anderson. *Final Results,* 62 Fed. Reg. at 37,544. The court found that Commerce's finding in this regard was not supported by substantial evidence. *Ta Chen,* 1999 WL 1001194 at *16. The court directed Commerce either to provide Ta Chen with an opportunity to submit evidence on the purported commissions or to disregard this issue on remand. Id. at *17. On remand, Ta Chen responded to Commerce's supplemental questionnaire, stating that it had not made any

sales during the POR on which it paid commissions to Anderson. Remand Results at 5. Commerce therefore did not apply facts available to Ta Chen's sales to Anderson upon remand. Id. This issue is thus no longer before the court.

Discussion

I. Application of adverse facts available

Ta Chen contests the application of adverse facts available to its sales to Sun, arguing that it was unable to provide Sun's information because of the sale to Picol International and Masaru Kimura in July 1995. Ta Chen argues that the Department's remand determination impermissibly concludes that Ta Chen is affiliated with the new entity, Picol Sun. Ta Chen maintains that it did not have control over Picol Sun's records and could not force Picol Sun to provide the necessary information. Ta Chen states that Department precedent does not support the application of adverse facts when a respondent cannot obtain information from an affiliate, but only supports the application of neutral facts available.

Commerce concluded that it could expect Ta Chen to provide Sun's information. Commerce stated in the Remand Results:

> We are not convinced that Sun's closure is a sufficient explanation as to why Ta Chen cannot develop the necessary information. The requested data relates to a period when Ta Chen and Sun were readily sharing the subject information. Thus, this is not a situation where one corporate entity would object to disclosure of confidential business information to another corporate entity. In this situation, it is reasonable to expect Ta Chen to work

> with Sun's new owners to obtain the new information.

RR at 11. As Commerce notes, the burden of creating an accurate record rests with the respondent. See *Tianjin Mach. Import & Export Corp. v. United States,* 16 C.I.T. 931, 936, 806 F. Supp. 1008, 1015 (1992) ("burden of creating an adequate record lies with respondents and not with Commerce") (citation omitted).

Ta Chen does not and cannot contest the fact it had operational control of Sun. The court found Commerce's affiliation finding supported by substantial evidence due to the numerous connections between Ta Chen and Sun. See *Ta Chen,* 1999 WL 1001194 at *4-10 (discussing Ta Chen and Sun's historical ties, Sun's distribution of only Ta Chen products, Ta Chen's custody of Sun's signature stamp, Ta Chen's credit monitoring of Sun, and debt financing arrangement between Ta Chen and Sun). It is reasonable for the Department to conclude that this operational control gave Ta Chen access to Sun's records. This conclusion is further supported by the fact that Ta Chen was able to provide other confidential records from Sun, such as Sun's federal income tax records. See *Final Results*, 62 Fed. Reg. at 37,552. It is also reasonable for Commerce to expect Ta Chen to maintain any relevant records pending the final outcome of the administrative review. See *Krupp Stahl A.G. v. United States,* 17 C.I.T. 450, 454, 822 F. Supp. 789, 793 (1993) (stating that respondents are responsible for maintaining their records during a pending litigation); *Koyo Seiko Co. v. United States*, 16 C.I.T. 366, 376, 796 F. Supp. 517, 525 (1992) (holding that respondent had responsibility of keeping records for the ongoing investigation despite Commerce's "extraordinary delay"). In order to comply to the best of its ability, Ta Chen should have preserved Sun's information in the event that its sales were classified as CEP.

Ta Chen argues that it did not have reason to provide Sun's information until January 1997, because the Department did not state its intention to classify Ta Chen's sales as CEP sales until the issuance of the Preliminary Results in January 1997. See *Certain Welded Stainless Steel Pipe from Taiwan,* 62 Fed. Reg. 1,435, 1,435-36 (Dep't Commerce 1997) (preliminary results of admin. rev.). By that time, Ta Chen argues, it could not have provided the information because Sun had already been sold. Ta Chen was nevertheless aware prior to January 1997 that its sales to Sun were at issue. As early as July 1994, Ta Chen knew its relationship with Sun was at issue because the petitioners had called it to the Department's attention in the first administrative review. See *Certain Welded Stainless Steel Pipe from Taiwan,* 64 Fed. Reg. 33,243, 33,244 (Dep't Commerce 1999) (final results of administrative review) (results from the first and second administrative reviews of Ta Chen). Petitioners also renewed their concerns regarding Sun in July 1995. Id. Ta Chen had reason to argue that it was not affiliated with Sun, pursuant to the new definition of the term "affiliated party." *Ta Chen,* 1999 WL 1001194 at *14. But Ta Chen cannot claim that it was unaware of the possibility that its sales would be classified as CEP sales, in light of its numerous connections with Sun. Ta Chen therefore could have, and should have, preserved its information on Sun's sales in order to provide full information for the Department.

Ta Chen also claims that the application of adverse facts available is inconsistent with prior determinations. Ta Chen cites in particular *Certain Cut-to-Length Carbon Steel Plate from Belgium,* 63 Fed. Reg. 2,959 (Dep't Commerce 1998) (final results of antidumping duty admin. rev.) [hereinafter "Cut-to-Length from Belgium"]. In that determination, Commerce stated it "may resort to adverse facts available in response to [respondent's] failure to report [information from

an affiliate] unless [respondent] establishes that it could not compel its affiliate to report [the information]." Id. Commerce chose not to make an adverse inference in that determination because the Department had not informed the respondent of certain deficiencies in the respondent's attempt to show that it could not obtain the information from the affiliate. Id. Similarly, in the other determinations cited by Ta Chen, Commerce applied a general rule of not using adverse facts when the respondent could demonstrate that it did try to obtain information from an affiliate. See *Roller Chain, Other than Bicycle, from Japan,* 62 Fed. Reg. 60,472, 60,476 (Dep't Commerce 1997) (notice of final results and partial recission of antidumping duty administrative review) (despite respondent's efforts, "it was not in a position to compel the affiliated customer to produce the information requested by the Department" and Department did not apply adverse facts available); see also *Certain Fresh Cut Flowers from Colombia*, 63 Fed. Reg. 5,354, 5,356 (Dep't Commerce 1998) (preliminary results and partial termination of antidumping duty admin. rev.) (Department chose not to apply adverse facts for missing information where respondent's "exhaustive efforts at locating [the information from a former affiliate] ... were futile"); *Certain Cut-to-Length Carbon Steel Plate from Brazil,* 63 Fed. Reg. 12,744, 12,751 (Dep't Commerce 1998) (final results of antidumping duty admin. rev.) (Department did not apply adverse inference where respondent "did attempt to obtain [COP] information from its affiliate" and where nature of affiliation was such that respondent could not compel affiliate to provide information).

On remand, Commerce applied this general rule as stated in Cut-to-Length from Belgium. As in that determination, the burden was on Ta Chen to show that it could not compel Sun to provide the information. Ta Chen failed to meet that burden. Upon remand, Ta Chen simply

forwarded the Department's questionnaire to Picol Sun, and once Picol Sun's counsel stated that Sun did not wish to comply, Ta Chen informed the Department that it would be unable to provide Sun's information. This was not a sufficient effort on the part of Ta Chen. See *Kawasaki Steel Corp. v. United States,* 110 F. Supp. 2d 1029, SLIP OP. 2000-91 at 22-23 (Ct. Int'l Trade, 2000) (holding that respondent's letters requesting information from affiliate were insufficient to show respondent cooperated to best of its ability because respondent simply acquiesced in affiliate's refusal to provide information).

Ta Chen argues that it was not provided with notice that its attempts to compel Picol Sun to provide the information were deficient. First, on remand time is of the essence, and parties need to take all steps necessary to comply with Commerce's requests promptly and forcefully. Second, the court cannot conclude that one additional chance for Ta Chen to remedy its errors would have made a difference in this case, because the Department's decision to apply adverse facts available is also supported by the fact that Ta Chen could have done more to preserve the information on Sun's U.S. sales when it clearly had control of the information. By not doing so, Ta Chen failed to comply to the best of its ability. The court therefore affirms the application of adverse facts available pursuant to 19 U.S.C. § 1677e(b).

II. Selection of the adverse margin

In the Final Results, Commerce applied a 31.90 percent margin as partial adverse facts to Ta Chen's sales to Sun and Anderson. *Final Results*, 62 Fed. Reg. at 37,555-56. This margin was the highest rate from the less than fair value investigation. *Ta Chen,* 1999 WL 1001194 at *17. This resulted in a weighted-average margin of 6.06 percent. *Final Results,* 62 Fed. Reg. at 37,556. The court did not address

Ta Chen's arguments concerning corroboration of the margin from data outside the review in its 56.2 motion, in light of its remand instructions. *Ta Chen,* 1999 WL 1001194 at *18.

On remand, Commerce applied an adverse inference only as to Ta Chen's sales to Sun. In recalculating the margin, Commerce "assigned the highest calculated margin for these remand results to be applied to Ta Chen's sales to Sun." RR at 5-6.[2] The margin used was 30.95 percent, which led to a recalculated weighted-average margin of 2.60 percent. Id. at 15-18. In choosing this margin, the Department explained:

> In conducting its own analysis of Ta Chen's U.S. sales, the Department found that the price and quantity of the sales for which a 30.95% dumping margin was calculated all fell within the normal range of price and quantity as the other sales; these sales were not unusually high or low in price or quantity. Furthermore, the product for which a 30.95% dumping margin was calculated was a normal product of Ta Chen's .... Additionally, the Department chose the 30.95% rate because it was calculated from Ta Chen's own sales.

RR at 16-17.

Ta Chen first argues that an adverse margin is unwarranted. Based on this assumption, Ta Chen maintains that the Department should have followed its practice of using the weighted-average dumping margin calculated for all of a respondent's other sales as the dumping margin for those sales lacking the information necessary to calculate a

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[2] Corroboration pursuant to 19 U.S.C. § 1677e(c)is not challenged because Commerce selected a margin based on Ta Chen's own information from this review.

dumping margin. See *Static Random Access Memory Semiconductors from Taiwan*, 63 Fed. Reg. 8,909, 8,920 (Dep't Commerce 1998) (notice of final determination of sales at LTFV) ("as facts available [Department] used the weighted-average dumping margin calculated for all of [respondent's] other sales"). Ta Chen acknowledges that doing so would have resulted in a weighted-average dumping margin of close to zero percent. This argument fails because the use of an adverse inference is warranted based on these facts, as already discussed. Commerce, therefore, was not required to use its neutral facts available methodology.

Ta Chen further argues that the Remand Results are contrary to court precedent and Commerce's own practice. Ta Chen asserts that the margin used by Commerce is aberrant, and that such margins may not be used. Under the former best information available ("BIA") rule, the court required Commerce to show that the margin it selected as BIA was not aberrant. See *National Steel Corp. v. United States*, 18 C.I.T. 1126, 1132-33, 870 F. Supp. 1130, 1136 (1994) ["NSC I"]. Ta Chen, however, misunderstands the court's concerns regarding aberrant margins. The court in NSC I did not hold that because a significant portion of respondent's sales had margins below the selected rate, that the selected rate was aberrant. Rather, the court's concern was that Commerce show that the particular margin chosen bear a "rational relationship" to respondent's sales. Id. (citation omitted). The NSC I court thus remanded the case for Commerce to explain why its selection of the BIA rate was not aberrant. Id. at 1133, 870 F. Supp. at 1137. After remand, the court accepted Commerce's criteria for selecting the highest non-aberrant margin as BIA. *National Steel Corp. v. United States*, 20 C.I.T. 100, 103, 913 F. Supp. 593, 596 (1996) ["NSC II"]. Commerce's guidelines for selecting the highest non-aberrant margin were to choose a margin

"sufficiently adverse and ... indicative of current conditions." Id.

After a second remand, the court upheld the specific margin used by Commerce because the margin came from sales which involved a common product and fell within the mainstream of respondent's transactions. *National Steel Corp. v. United States,* 20 C.I.T. 743, 745-46, 929 F. Supp. 1577, 1580 (1996) ["NSC III"]. In upholding the BIA margin, the court also noted that "[there was] nothing in the record to indicate that [the] particular sale was not transacted in a normal manner." Id.; see also *Calcium Aluminate Cement, Cement Clinker and Flux from France,* 59 Fed. Reg. 14,136, 14,141 (Dep't Commerce 1994) (final determinations of sales at LTFV) ("When we resort to partial BIA, it is our practice to use the highest non-aberrational margin based on respondent's reported sales. This is an adverse figure, yet is based on the respondent's calculated margins.")[3] Commerce's selection of the 30.95 percent

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[3] Commerce certainly may not use a margin known to be inaccurate. See D*&L Supply Co. v. United States,* 113 F.3d 1220, 1224 (Fed. Cir. 1997) (holding that Commerce may not use highest margin from prior administrative review as BIA where that margin has been "demonstrated to be inaccurate"). The margin used here, however, is not inaccurate. It was calculated based on Ta Chen's own reported data. The court in D&L Supply noted that the purpose of using the highest prior antidumping duty rate as BIA is to "[offer] some assurance that the exporter will not benefit from refusing to provide information, and [to produce] a ... rate that bears some relationship to past practices in the industry in question." Id. at 1223. While the margin used here was not drawn from a prior review, the same goals are served by using the 30.95 percent margin: Ta Chen will not benefit from refusing to provide the information, and the margin bears a rational relationship to Ta Chen's selling practices.

margin as the adverse rate in this case conforms to the court's requirement that the rate not be aberrant, because although the rate is adverse, it is indicative of Ta Chen's sales.

The Department continues to use the highest non-aberrational margin as adverse facts available. See *Stainless Steel Sheet and Strip in Coils from Germany*, 64 Fed. Reg. 30,710, 30,714 (Dep't Commerce 1999) (final determination of sales at LTFV) ("As adverse facts available we have assigned the highest non-aberrational margin calculated for this final determination ....") In that determination, Commerce determined the highest non-aberrational margin by examining the frequency distribution of the margins calculated for the respondent's reported data. Commerce then selected the highest margin for the 10 percent of respondent's transactions which fell within a specific range. Id. Ta Chen argues that the Department did not use this same methodology in the remand results. The Government acknowledges that Commerce did not use the precise methodology as stated in Stainless Steel Sheet and Strip in Coils from Germany, because to have done so would have resulted in a final margin of zero percent, thereby eviscerating the adverse inference.

Ta Chen argues that Commerce cannot choose a facts available margin based solely on the fact that it is the highest margin available. Ta Chen relies on *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185 (Fed. Cir. 1990). Rhone Poulenc, however, supports Commerce's position. Analyzing Commerce's practice under BIA, the Federal Circuit stated that it was appropriate for Commerce to presume that the highest prior margin was the best information of current margins. This presumption "reflected a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced current

information showing the margin to be less." Id. at 1190. This reasoning also applies in this case because using the highest calculated dumping margin provided an incentive for Ta Chen and other respondents to produce information.

Ta Chen also contests the Department's characterization of the sales with the 30.95 percent dumping margin as falling within the normal range of price compared to other sales. Ta Chen states that the 0.04 percent of sales with a 30.95 percent dumping margin were at a significantly lower price than other Ta Chen sales. Ta Chen Remand Br. at 28. Commerce's determination that the price of the sales for which a 30.95 percent dumping margin was calculated fell within the normal range of price as other sales, is supported. In comparing price, Commerce printed lists of the twenty-one highest negative and positive margins for Ta Chen. The price of the sales with the 30.95 percent dumping margin fell within the range of these prices.[4] As in *NSC III,* 20 C.I.T. at 746, 929 F. Supp. at 1580, there is nothing to indicate that the sales with this particular margin were not "transacted in a normal manner."[5]

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[4] The prices for the positive dumping margins ranged from [ ] to [ ]. Final Margin Calculations (Jan. 18, 2000), at 54, C.R. Doc. 1269, Def.'s Remand Ex. 2, at 1. The price of the 30.95 percent sale was [ ]. Id. The prices for the negative dumping margins ranged from [ ] to [ ]. Id. at 56, Def.'s Remand Ex. 2, at 2.

[5] Ta Chen also contests Commerce's characterization of the 30.95 percent sales as falling within the range of Ta Chen's other sales for quantity. The Government explains Commerce's position by noting that the quantity of the sales with the 30.95 percent margin was [ ], and the range for the other sales was from [ ] to [ ]. Govt' Remand Br. at 29 (referring to Ta Chen's data sets attached to Ta Chen's Supplemental Questionnaire Response (Nov. 12, 1996), C.R. Doc. 8). Given the range, this is not a particularly telling

(footnote continued on next page)

Ta Chen maintains that Commerce may not use a margin where fewer than 0.5 percent of the respondent's sales had that margin, because such sales are de minimis. The Government argues that "the number of sales with the chosen dumping margin [is not] a factor in determining whether the margin is useable as facts available. Instead, Commerce seeks to determine whether the sale on which the margin is derived is otherwise representative of a respondent's other sales." Gov't Remand Br. at 31-32. Ta Chen relies on two revocation decisions for its position. See *Pure Magnesium from Canada*, 64 Fed. Reg. 50,489 (Dep't Commerce 1999) (final results of antidumping duty admin. rev. and determination not to revoke order in part); *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 64 Fed. Reg. 2,173 (Dep't Commerce 1999) (final results of antidumping duty admin. revs. and determination to revoke in part). Commerce distinguished these determinations in the Remand Results on the basis that they involved the issue of whether dumping margins were reflective of a company's normal practice in the context of determining whether the sales had been made in commercial quantities for purposes

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factor; but Commerce's other bases for testing the margin are supportive of its choice. Further, the highest margin selected was close to margins for other sales, although the percentage of sales with positive margins was small.

Ta Chen also argues that the number of sales of the product was not typical because it only represented 2.4 percent of Ta Chen's POR sales. The Government states that Ta Chen made [ ] sales of this product during the POR. Id. The Government notes that the number of sales is substantial, "regardless of the percentage these sales represent of Ta Chen's total sales." Gov't Remand Br. at 29.

of a revocation decision. RR at 17. Those determinations did not involve the use of adverse facts available. Commerce stated that it had "never determined that an adverse facts available margin should be reflective of a respondent's actual dumping margins. The purpose of applying adverse facts available is to induce respondents to cooperate with the Department's proceedings." Id. While the court does not accept Commerce's proposition that accuracy is not a goal when using adverse facts available,[6] it agrees with Commerce that in these particular circumstances, if Commerce rejected Ta Chen's sales which had positive dumping margins on the ground that they were de minimis, Commerce would not be applying an adverse inference, while still using Ta Chen's information, because Ta Chen would receive a zero percent dumping margin.

Ta Chen lastly argues that Commerce's choice of the partial adverse facts margin is inconsistent with the record as a whole. Ta Chen maintains that it is unreasonable to conclude that the partial 30.95 percent margin is indicative of Ta Chen's actual selling practices. Ta Chen ignores that the methodology chosen by Commerce was the only way to apply an adverse inference in this case, while still using

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[6] The court has previously noted its concern that facts available margins bear a rational relationship to the matter to which they are applied. See *Ferro Union, Inc. v. United States*, 44 F. Supp. 2d 1310, 1334-35 (Ct. Int'l Trade 1999) (Commerce must select a total substitute margin which is relevant and reliable, and bears rational relationship to matter to which it is applied); *World Finer Foods, Inc. v. United States*, 2000 Ct. Intl. Trade LEXIS 72, No. 99-03-00138, 2000 WL 897752 at *6 (Ct. Int'l Trade June 26, 2000) (court will not uphold use of individual transaction margins which bear no apparent relationship to current level of dumping in industry to corroborate a total substitute margin).

respondent's own information. Ta Chen's argument that a lower margin, of zero or 3.27 percent,[7] would also serve the purpose of inducing Ta Chen to cooperate is not persuasive. One of the purposes of using adverse facts available is to "ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." Statement of Administrative Action ("SAA"), accompanying H.R. Rep. No. 103-826(I), at 870, reprinted in 1994 U.S.C.C.A.N. 3773, 4199; see also *NSC I,* 18 C.I.T. at 1132, 870 F. Supp. at 1136 (recognizing under BIA that "although the ultimate purpose of BIA is not to punish, BIA is intended to be adverse"). If Commerce had used one of the lower margins, as suggested by Ta Chen, Ta Chen might have achieved a better result by failing to cooperate than by cooperating and providing Sun's information. The SAA also states that Commerce does not have to prove that the facts available are the best alternative information. " Rather, the facts available are information or inferences which are reasonable to use under the circumstances." SAA at 869, 1994 U.S.C.C.A.N. at 4198. The court therefore affirms the use of the 30.95 percent margin as partial adverse facts available, resulting in an overall 2.60 percent margin for Ta Chen after remand.

Conclusion

Commerce's application of partial adverse facts available and its selection of the adverse margin were in accordance with law and supported by substantial evidence. The remand results are therefore affirmed in their entirety.

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[7] Ta Chen received a 3.27 percent dumping margin in the original less than fair value investigation. *Certain Welded Stainless Steel Pipe from Taiwan,* 57 Fed. Reg. 62,300, 62,301 (Dep't Commerce 1992) (amended final determination and antidumping duty order).

Jane A. Restani

Judge

Dated: New York, New York, This 25th day of August, 2000.

APPENDIX C

UNPUBLISHED

U.S. DEPARTMENT OF COMMERCE

A-583-815

Certain Welded Stainless Steel Pipe from Taiwan
Final Results of Redetermination
Pursuant To Court Remand
Ta Chen Stainless Steel Pipe. Ltd.
v.
The United States and Avesta Sheffield, Inc., et al.

February 25, 2000

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

SUMMARY:

On October 28, 1999, the United States Court of International Trade ("Court") remanded the final results of the 1994-1995 administrative review of Certain Welded Stainless Steel Pipe from Taiwan to the Department of Commerce ("Department") on two issues: (1) to give Ta Chen Stainless Steel Pipe. Ltd. ("Ta Chen") an opportunity to submit information on Sun Stainless, Inc.'s ("Sun") U.S. sales; and (2) to give Ta Chen an opportunity to submit evidence on any sales to Company C that were made during the POR and on which commissions were paid to Anderson Alloys ("Anderson"). For these final remand results, the Department has provided Ta Chen an opportunity to submit information on these two issues. Additionally, the

Department has recalculated the margin which it applied as partial adverse facts available. For a more detailed explanation of each item, see the Department's discussion section, *infra*. Ta Chen submitted comments to the Department's draft remand results on February 7, 2000.

BACKGROUND:

On July 14, 1997, the Department published its final results in the third administrative review of certain welded stainless steel pipe from Taiwan ("WSSP" or "subject merchandise"). *Final Results of Antidumping Administrative Review; Certain Welded Stainless Steel Pipe From Taiwan*, 62 FR 37543 (July 14, 1997) ("*Final Results*"). The administrative review proceeding covered imports of subject merchandise during the period December 1, 1994 through November 30, 1995.

DISCUSSION:

Information on Sun: In the Final Results, the Department determined that Sun was affiliated with Ta Chen, because Ta Chen had operational control over Sun by virtue of Ta Chen's ability to exercise restraint or direction over Sun within the meaning of 19 U.S.C. § 1677(33). The Department applied an adverse facts available margin to Ta Chen's constructed export price ("CEP") sales to Sun because of Ta Chen's failure to provide information on Sun's U.S. sales. *See Final Results*, 62 FR at 37552. The Court upheld the Department's determination that Ta Chen and Sun are affiliated, but held that the Department had not given Ta Chen adequate notice of that determination and that it did not provide Ta Chen with an opportunity to provide information on Sun's U.S. sales before classifying such sales as CEP sales. See Slip-Op. 99-117 at 39-41.

Pursuant to Court remand, on November 9, 1999, the Department issued a supplemental questionnaire to Ta Chen requesting, *inter alia*, information on Sun's U.S. sales for the period of review ("POR"). On November 30, 1999, Ta Chen requested an extension of time in which to provide information on Sun's U.S. sales. Ta Chen submitted a November 25, 1999 letter from Sun's counsel stating that Sun's position as of that time was not to cooperate with the Department's inquiry because Sun had closed as of September 30, 1996. Counsel further stated that Sun does not currently maintain any business operation in the U.S. and it would be burdensome and costly to respond to the Department's request. However, Sun's counsel stated that he would ask his client to reconsider. On December 2, 1999, the Department granted Ta Chen's request for an extension of time, in order to allow Ta Chen additional time to procure a response from Sun. On December 7, 1999, Ta Chen requested a further extension. However, on December 8, 1999, Ta Chen informed the Department that Sun would not be responding to the Department's supplemental questionnaire. Ta Chen attached a second letter from Sun's counsel stating that Sun would not respond to the Department's questionnaire for the reasons indicated in his November 25 letter.

Section 776(a) of the Tariff Act of 1930, as amended (the "Act"), states that where necessary information is not available on the record or an interested party withholds information that has been requested by Commerce, fails to provide such information in the time or manner requested, significantly impedes the proceeding, or provides information that cannot be verified, Commerce shall use the facts otherwise available in reaching its determination. 19 U.S.C. § 1677e(a). In this remand, Ta Chen has withheld or failed to provide the information requested regarding Sun's U.S. sales despite repeated notification of the deficiency

under section 782(d) of the Act. 19 U.S.C. § 1677m(d). Accordingly, the Department must use the facts otherwise available.

Section 776(b) of the Act further provides that where Commerce finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from Commerce, Commerce may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. 19 U.S.C. § 1677e(b). Such adverse inference may include reliance on information derived from the petition, a final determination in the investigation, any previous review or determination, or any other information placed on the record. *Id.* In this case, the Department has determined that the application of an adverse inference is appropriate because Ta Chen has failed to act to the best of its ability in responding to the Department's request for information regarding Sun's U.S. sales.

This Court has upheld the Department's determination that Ta Chen is affiliated with Sun and had control over Sun based, inter alia, on their close-supplier relationship, TCI's (a wholly-owned U.S. subsidiary) custody of Sun's signature stamp, Ta Chen's unlimited access to Sun's computer database containing Sun's accounts receivable, accounts payable, inventory and pricing information, and its participation in the negotiations of Sun's sales of WSSP. *See* Slip Op. 99-117 at 23, 33-35. Thus, it has already been established that Ta Chen had operational control over Sun and had access to its sales and pricing data. Ta Chen knew that Sun's U.S. sales were an issue both in the administrative review and in this litigation and that there was a possibility that Ta Chen would be requested to provide those records once again. Indeed, it was Ta Chen who had argued that it had not been given an adequate opportunity to produce Sun's records. Accordingly, Ta Chen should have taken steps to

obtain and preserve the relevant records. It cannot now rely on the fact that Sun is no longer in business to justify its failure to produce the necessary documentation. Even where there is evidence showing that an affiliated party is unwilling to cooperate in providing information necessary to determine constructed export price, the burden of producing the information requested by Commerce rests with the parties that possess that information. *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 64 FR 24329, 24368 (May 6, 1999) ("Hot-Rolled from Japan"). Thus, Ta Chen's and Sun's failure to produce these records constitutes a failure to act to the best of their ability. Accordingly, the Department has concluded that the use of an adverse inference is appropriate in selecting among the facts otherwise available with respect to Sun's U.S. sales.

In applying adverse facts available to Sun's U.S. sales, the Department used Ta Chen's own data to develop the appropriate rate to be used as facts available. *See* Recalculation of Weighted-Average Margin section, *infra*.

Sales to Anderson: In the Final Results, the Department determined that Ta Chen failed to act to the best of its ability in reporting its U.S. sales to one of its customers, Company C, and commissions paid to Anderson on these sales. Because this lack of data meant the Department could not segregate such sales for the final margin calculation, it applied adverse facts available to all Ta Chen's sales to Company C/Anderson. The Court held that the Department's finding that Ta Chen misreported its sales to Company C is not supported by substantial evidence, as it was unclear whether such sales fell within the relevant POR. Pursuant to Court remand, on November 9, 1999, the Department issued a supplemental questionnaire to Ta Chen requesting, *inter alia*, information on sales to Company C and on the commissions paid to Anderson on such sales for

the relevant POR, as well as the three months preceding and the two months following. On November 30, 1999, Ta Chen responded that there were no such sales during the indicated period. Thus, for these final remand results, we have not applied our facts available methodology to these sales based on Ta Chen's statement that it paid no commissions to Anderson on Company C sales. *See* Recalculation of Weighted-Average Margin section, *infra*.

Recalculation of Weighted-Average Margin: The Department has reconsidered the appropriate margin to be used as adverse facts available in this remand determination, and has decided to use data taken directly from information Ta Chen previously submitted in this review for purposes of calculating an adverse facts available margin. In accordance with the Department's past practice, as adverse facts available, we have assigned the highest calculated margin calculated for these final remand results to be applied to Ta Chen's sales to Sun. *See Notice of Final Determination of Sales at Less Than Fair Value; Stainless Steel Sheet and Strip in Coils from Germany*; 64 FR 30710, 30714 (June 8, 1999), and *Final Determination of Sales at Less Than Fair Value: Calcium Cement and Cement Clinker and Flux from France*, 59 FR 14136,14141 (March 25, 1994). In choosing the sale with the highest calculated margin, we compared this sale to other Ta Chen sales by price, product, and quantity and found this sale to be similar to Ta Chen's other sales. Therefore, we find that this sale is indicative of Ta Chen's customary selling practices and that this sale's margin is appropriate for use as an adverse facts available rate. In applying this new rate, the Department has recalculated the dumping margin for Ta Chen. *See* Final Results of Redetermination section, *infra*; *see also* the Department's Margin Calculation Program (February 25, 2000).

INTERESTED PARTY COMMENTS ON THE DEPARTMENT'S DRAFT RESULTS

Comment 1: Sun Sales/Adverse Facts Available

Respondent argues that the Department's adverse inference in its draft remand results with regard to Sun sales is unlawfully based on Sun's failure to provide requested data because Sun was not affiliated with Ta Chen at the time the Department's request was made because Sun was no longer in business. Ta Chen asserts that the Department did not request Sun sales until November 9, 1999, and Ta Chen did not have access to Sun's data at that time due to Sun's closure. Additionally, respondent contends that the Department changed its decision-making process for affiliated parties during the administrative review and, as a result, requested Ta Chen to describe its relationship with Sun. Thereafter, the Department determined that Sun was an affiliate of Ta Chen. Respondent argues that, from that point forward, the Department has imposed adverse facts available to Ta Chen for its failure to provide Sun's sales.

Respondent contends that the Court has ruled that it is unlawful to impose adverse facts available on a respondent for failure to provide information that is not in the respondent's control, *citing, Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. U.S.*, 18 CIT 906, 915 (1994), *aff'd* 68 F.3d 487 (Fed. Cir. 1995) ("*Ad Hoc Comm*"); *Asociacion Colombiana de Exportadores de Flores v. U.S.*, Slip Op. 99-24 at 19 (Ct. Int'l Trade March 16, 1999)("*Asociacion Colombiana*"); *Mannesmannrohren-Werke Ag and Mannesmann Pipe & Steel Corp. v. U.S.*, Slip Op. 99-118 at 23-24 (Ct. Int'l Trade October 29, 1999) ("*Mannesmannrohren*"). Also, Ta Chen cites to a Departmental decision in which the Department allegedly did not apply adverse facts available because the respondent could not obtain information from its affiliated customer. *See Final Results and Partial Recission of Antidumping Duty*

administrative Review; Roller Chain, Other Than Bicycle from Japan, 62 FR 60472, 60476 (November 10, 1997) ("*Roller Chain*"). Moreover, Ta Chen asserts that past Departmental practice has stated that if an affiliate closed, then adverse facts available could not be imposed for failure of that affiliate to provide resale information. *See Final Results*, 62 FR at 37552 and cases cited therein. Respondent further states that the Department has not explained its rationale for its departure from its practice. Additionally, respondent notes that the Department's reliance on *Hot-Rolled from Japan*, 64 FR at 24368, for applying adverse facts available is misplaced because, in that case, the respondent was in a position to provide the requested data from its existing affiliate. Respondent also states that the draft remand results failed to provide any guidance as to how Ta Chen could have obtained Sun's data.

Respondent argues that it could not have provided Sun's sales even if it had been requested earlier because Sun was sold to an unaffiliated party in July 1995. Thus, the Department had no authority to impose adverse facts available because Ta Chen could not obtain Sun's data. Further, respondent argues that there is no evidence on the record that Ta Chen can compel Sun to provide Sun's data. Therefore, respondent asserts that the Department use of adverse facts available is not lawful because there is no evidence on the record that Ta Chen failed to act to the best of its ability to provide Sun's data as stated in the Department draft remand.

Department's Position: We disagree with respondent. As we stated in the draft remand results, the Court upheld the Department's determination that Ta Chen and Sun are affiliated predicated on the fact that Ta Chen had control over Sun based on, inter alia, Ta Chen's access to Sun's computer system containing its pricing information, its participation in the negotiations of Sun's sales of subject

merchandise, and TCI's custody of Sun's signature stamp. *See* Slip-Op. 99-117 at 23, 33-34 and Discussion Section of these Remand Results. Additionally, the Court stated in its opinion that: "Commerce's determination that Ta Chen controlled Sun is supported by substantial evidence. Even if each of the individual connections between Ta Chen and Sun, standing alone, may not be sufficient to establish control, Commerce's conclusion that the numerous connections between Ta Chen and Sun were indicative of control was reasonable. Commerce did not rely on any one factor in concluding that Ta Chen and Sun were affiliated parties, rather, it determined that the combination of factors was sufficient proof of affiliation." *See* Slip Op. 99-117 at 32. Thus, Ta Chen may not re-argue whether it is affiliated with Sun. It is clear that at the time the sales were made, Ta Chen and Sun were affiliated.

Ta Chen was found to be affiliated with Sun throughout the POR based on operational control, not stock ownership. Thus, Ta Chen's argument regarding Sun's sale to an unaffiliated party in July 1995 is irrelevant. There is no evidence on the record indicating that this change in ownership in any way affected Ta Chen's operational control over Sun.

Furthermore, in the "Corporate Structure and Affiliations" section of the initial Section A questionnaire that was issued in February 1996 Commerce specifically requested Ta Chen to report companies affiliated through means other than stock ownership. *See* Department's Initial Questionnaire dated February 13, 1996. Ta Chen was specifically instructed to contact Commerce "[i]f you are uncertain whether a company is affiliated with you . . ." *Id.* at G-6. In addition, the new definition of "affiliated person" from the URAA was included in the Glossary of Terms at Appendix I. Therefore, in its initial questionnaire, Commerce clearly and specifically asked Ta Chen to report

parties affiliated with it through control, the nature of the affiliation, and the first sales to unaffiliated purchasers in the United States. Additionally, the Department instructed Ta Chen to contact the Department immediately if it should have any questions concerning the affiliated party provision.

Ta Chen had notice that its relationship with Sun in particular, raised a question with the Department as to affiliation at least as early as October 1996. Commerce issued a supplemental questionnaire to Ta Chen on October 22, 1996. In this supplemental questionnaire, among other questions, Commerce asked Ta Chen to "explain in detail your relationship, past and present, with all entities known as Sun Stainless or Sun Stainless, Inc." Commerce's first supplemental questionnaire, C.R. 6 (Oct. 22, 1996), Exhibit 3 at 7. Ta Chen responded to this supplemental questionnaire on November 12, 1996. After explaining that Ta Chen had done business with [ ][1] and Sun Stainless, Inc. (incorporated by Frank McLane, a former board member of Ta Chen), Ta Chen stated that it "assumed that the question was asked because the Department seeks information that might bear upon whether [ ] or Frank McLane's Sun Stainless was affiliated with" Ta Chen or Ta Chen International. Ta Chen's response to the first supplemental questionnaire, C.R. 8, Exhibit 4, at 35-36. Thus, even though Sun allegedly closed in September 1996, Ta Chen knew its potential affiliation with Sun was an issue in the ongoing review and that it might eventually be asked to produce documentation regarding Sun's sales.

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[1] Again, in the Final Results of this review [ ] was referred to as Company A. However, the identity of [ ] was never placed on the public record and will continue to be treated as proprietary information.

Although the Court held that these questionnaires were not sufficient for Ta Chen to have notice that the Department would determine Ta Chen and Sun to be affiliated, the questionnaires did at least put Ta Chen and Sun on notice that their relationship was an issue in the administrative review. Thus, Ta Chen should have taken steps to obtain and preserve the relevant records in case the Department determined Ta Chen and Sun to be affiliated. In addition, Ta Chen certainly has known since the Department's preliminary results of this case that the Department considered Ta Chen and Sun affiliated parties. Ta Chen cannot now argue that it could not provide Sun's sales because Sun is no longer in business. Ta Chen had direct access to Sun's sales information during the POR given its unusually close relationship with Sun and control over Sun. Ta Chen requested the review of sales made during the POR in December 1995, shortly after Sun's change in ownership, and well before Sun's closure. As stated above, Ta Chen should have taken steps at that time to obtain and preserve information relating to sales during the POR including Sun's sales information. Further, Ta Chen has never stated that Sun's records do not exist, only that Sun is no longer in business. In fact, Sun's attorney has stated on the record that Sun is choosing not to cooperate. *See* Letter from Ta Chen to the Department dated November 25, 1999.

We are not convinced that Sun's closure is a sufficient explanation as to why Ta Chen cannot develop the necessary information. The requested data relates to a period when Ta Chen and Sun were readily sharing the subject information. Thus, this is not a situation where one corporate entity would object to disclosure of confidential business information to another corporate entity. In this situation, it is reasonable to expect Ta Chen to work with Sun's new owners to obtain the information.

Ta Chen cited three court cases, *Ad Hoc Comm., Asociacion Couumbiana and Mannesmannrohren* in support of its position that the Department unlawfully applied adverse facts available for its failure to provide Sun's U.S. sales. We respectfully disagree with Ta Chen's interpretation of these cases. While each of these cases referred to the application of adverse facts available in the general sense, none of the cases actually decided the issue of a respondent's ability to obtain relevant information from an affiliated party. Additionally, Ta Chen cited *Roller Chain* as supporting its position that the Department need not apply adverse facts available when the respondent is unable to obtain the information from an affiliated party. Again, we disagree with respondent's characterization of this case as being on point. First, we are able to distinguish *Roller Chain* from this current administrative review, because in *Roller Chain* the respondent was attempting to obtain home market downstream sales. While home market downstream sales are important to the Department's overall analysis for arm's length and comparison purposes, even without these sales we are still able to perform our dumping analysis. However, without the appropriate U.S. sales, we are not able to establish if the subject merchandise is being sold in the U.S. market at a price lower than is charged in the domestic market. Second, in *Roller Chain*, we determined that affiliation was based on a percentage of stock ownership, whereas in this case we determined affiliation on the fact that Ta Chen actually controls the day-to-day operations of Sun. Stock ownership does not automatically grant the entity holding the stock control of a company, while, here, Ta Chen was found to exercise operational control over Sun.

In light of Ta Chen's failure to provide the requested information, the Department has continued to rely on adverse facts available. Therefore, for these final remand results, we have not made any changes from our draft remand results.

Comment 2: Choice of Margin Used as Facts Available

The Department has reconsidered the appropriate margin to be used as adverse facts available in this remand determination, and has decided to use data taken directly from information Ta Chen previously submitted in this review for purposes of calculating an adverse facts available margin. Ta Chen argues that the Department has no basis to make an adverse inference. However, according to Ta Chen, when it has made such an inference, the Department has used a weighted-average dumping margin as adverse facts available, *citing Notice of Final Determination of Sales at Less Than Fair Value; Static Random Access Memory from Taiwan*, 63 FR 8909, 8920 (February 23, 1998). Ta Chen argues that the Department should use the weighted-average dumping margin for Ta Chen's sales to its non-Sun customers. Ta Chen accuses the Department of unlawfully selecting the applied margin merely "because it wants a higher margin," *citing Ferro Union v. U.S.*, 44 F. Supp. 2d 1310, 1335 (C.I.T. 1999); *Hot-Rolled from Japan*, 64 FR at 24354. See Ta Chen's Comments, at 14 (February 8, 2000). Ta Chen also points to the Department's response at oral argument regarding Ta Chen's negotiations with Sun, and argues that the Department is not focusing on the POR, claiming that this further supports Ta Chen's argument that the Department should use the average of margins found on sales other than those to Sun.

Ta Chen argues that roughly 90% of its sales were to customers other than Sun. Ta Chen states that the weighted-average dumping margin on those sales was negative and that, calculated by quantity, the Department found dumping in .71 % (by quantity) of those sales. Furthermore, Ta Chen argues that, by quantity, only .04% of those sales were found by the Department to have a margin of 30.95% (which the Department used as the facts available margin in the draft

remand results). Ta Chen argues that since the sales in which the Department found dumping were de minimis in number, such sales were aberrant and not representative of Ta Chen's sales. Ta Chen argues that its conclusion is supported by the 3.27% dumping margin in the original investigation, and the *de minimis* dumping margins found in the reviews following the review period at issue in this remand.

Ta Chen argues that the Department's choice of margins is contrary to Departmental practice to exclude aberrant dumping margins, *citing* Ta Chen's Brief in support of its Rule 56.2 Motion for Judgement on the Agency Record, at 16, 28-30, CIT Case No. 97-08-01344 (September 28, 1998); Ta Chen's Reply Brief, at 6-9, CIT Case No. 97-08-01344 (January 6, 1999); *Notice of Final Determination of Sales at Less Than Fair Value; Extruded Rubber Thread from Malaysia*, 57 FR 38465 (August 25, 1992); *Final Determination of Sales at Less Than Fair Value; Stainless Steel Sheet and Strip Coils from Germany*, 64 FR 30710, 30714 (June 8, 1999) ("*SSSS from Germany*"). Ta Chen argues that the Department has no support for its decision to choose the sale with the highest calculated margin for use as facts available. Ta Chen faults the Department for not applying the *SSSS from Germany* methodology in this remand. Ta Chen argues that, applying the SSSS from Germany methodology, Ta Chen's highest non-aberrant margin is 0%.

In support of its argument that the sales for which the Department found dumping margins were aberrant and should be discarded, Ta Chen points to the fact that the sales involved in the 30.95% dumping margin were all from one invoice, and accounted for .51% of Ta Chen's U.S. sales, and 2.4% of Ta Chen's U.S. sales by quantity. In fact, Ta Chen argues that all the sales involved in dumping margins over 13% were from that one invoice. Ta Chen goes on to argue that the net price on the sales involved in the 30.95%

dumping margin was 83% less than the 1995 average for the product sold. In looking at all sales with dumping margins, the average price in those sales was 63% less than the 1995 average for the product sold. Ta Chen conducted "t-tests" on these differences in price and concludes that the differences in price, between sales where dumping was found versus sales where dumping was not found, are statistically significant. Ta Chen also created scatter diagrams on a product-to-product basis to chart this statistical difference.

Finally, Ta Chen argues that the Department failed to define the standard it used in determining that the pricing on the dumping margin used is "similar" to Ta Chen's other U.S. pricing, in applying it as facts available. Without defining its standards for "similar", Ta Chen argues that the Department's Draft Results are not transparent and are, therefore, unlawful. Ta Chen also argues that the percentage of sales with a 30.95% dumping margin are too small to be considered, *citing Final Results of Antidumping Administrative Review and Determination Not to Revoke Order in Part; Pure Magnesium from Canada*, 64 FR 50489, 50492 (September 17, 1999) ("*Magnesium from Canada*"); *accord, Final Results of Antidumping Duty Administrative Review and Determination to Revoke in Part; Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 64 FR 2173, 2175 (January 13, 1999) ("*COR and CTL Plate from Canada*"). Ta Chen also argues that the Department failed to properly consider the record in its entirety, specifically, the "overwhelming" evidence that the 30.95% margin, used by the Department, is not representative of Ta Chen's U.S. sales practice. Ta Chen also argues that a reasonable mind would not conclude that Ta Chen would practice dumping where 99.29% of its sales had no dumping, and where U.S. prices were above home market prices.

Department's Position: We disagree with Ta Chen. The Department has sufficient basis for recalculating Ta Chen's dumping margin using the highest weighted-average dumping margin from Ta Chen's other sales as adverse facts available. The Department first addresses Ta Chen's accusation that the Department chose Ta Chen's highest weighted-average dumping margin as facts available "simply because it wants a higher margin." The Department notes that prior to this recalculation, Ta Chen's margin was 6.06%. *See Certain Welded Stainless Steel Pipe from Taiwan; Final Results of Administrative Review*, 62 FR 37543, 37556 (July 14, 1997). After the Department recalculated the margin using Ta Chen's highest weighted-average dumping margin from its other sales, the margin dropped to 2.6%. *See Draft Results of Redetermination* (January 18, 2000). In addition, if the Department were truly interested in using the highest margin as adverse facts available, it could have continued to use 31.9% as it did in the Final Results.

Ta Chen's argument that the dumping margins in the investigation and the reviews subsequent to the review period at issue in this remand suggest that the sales were aberrant, misses the point. Whether or not a respondent engaged in dumping for another review period cannot be read as determining how the respondent behaved in the POR at issue.

Ta Chen is correct that the Department rejects margins considered to be aberrant. However, the Department disagrees with Ta Chen's classification of its dumping margins as "aberrant." First, the Department does not conduct statistical "t test" calculations to determine whether or not sales are aberrant. More importantly, however, it is not Departmental practice to exclude sales from U.S. market calculations. Exclusions are made only in calculations for the foreign market; the Department uses all U.S. sales in conducting calculations on the U.S. market. In its draft

remand, the Department explained that "{i}n choosing the sale with the highest calculated margin, we compared this sale to other Ta Chen sales by price, product, and quantity and found this sale to be similar to Ta Chen's other sales." Thus, the Department examined more than price when determining whether the sale was sufficiently similar to Ta Chen's other sales to be considered "non-aberrant"[2] Moreover, whether or not price is similar to prices of other sales is less important than other circumstances indicating whether sales are aberrant.

Ta Chen argues that the Department's standards in this regard are not sufficiently clear. However, it is clear what variables the Department scrutinized in comparing sales. In conducting its own analysis of Ta Chen's U.S. sales, the Department found that the price and quantity of the sales for which a 30.95% dumping margin was calculated all fell within the normal range of price and quantity as the other sales; these sales were not unusually high or low in price or quantity. Furthermore, the product for which a 30.95% dumping margin was calculated was a normal product of Ta Chen's. The Department therefore concluded that the sales for which the 30.95% dumping margin was calculated was properly typical of Ta Chen's range of sales, and was proper for using as adverse facts available. Additionally, the Department chose the 30.95% rate because it was calculated from Ta Chen's own sales, and did not fall on the extreme, as evidenced by Ta Chen's own charts. *See* Ta Chen's

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[2] The Department could not use the exact methodology used in *SSSS from Germany* because to do so would result in a 0% dumping margin, as Ta Chen admits. Obviously such a margin does not induce a resondent's cooperation, which is the purpose of the adverse facts available provision.

comments, at Table II (indicating a slow rise in margins culminating at the 30.95% rate).

As for Ta Chen's argument that there are too few sales with a 30.95% dumping margin for proper consideration, the cases cited by Ta Chen (*Magnesium from Canada, and COR and CTL Plate from Canada*) do not support its argument. The discussion in those cases regarding whether dumping margins were reflective of a company's normal practice were made in the context of determining whether the sales had been made in commercial quantities in the context of a revocation decision. The use of these sales did not involve adverse facts available issues. Furthermore, the Department has never determined that an adverse facts available margin should be reflective of a respondent's actual dumping margins. The purpose of applying adverse facts available is to induce respondents to cooperate with the Department's proceedings. The SAA provides that, where a party has not cooperated in a proceeding:

> Commerce ... may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. In employing adverse inferences, one factor the agencies will consider is the extent to which a party may benefit from its own lack of cooperation.

See SAA at 870; *see also Notice of Preliminary Determination of Sales at Less Than Fair Value; Structural Steel Beams from Japan*, 65 FR 6992, 6994 (February 11, 2000). Here, the Department has determined that Ta Chen did not cooperate to the best of its ability and that an adverse inference is therefore appropriate to induce Ta Chen's cooperation in further reviews. The Department believes that the use of Ta Chen's highest weighted-average dumping margin is sufficiently adverse to achieve this goal. Accordingly, the Department is maintaining its use of Ta

Chen's highest weighted-average dumping margin as adverse facts available.

FINAL RESULTS OF REDETERMINATION

The Department has recalculated the dumping margin for Ta Chen based upon the changes set forth, *supra*. Accordingly, for these final results, the weighted-average margin for Ta Chen for the period December 1, 1994 through November 30, 1995 is 2.60 percent.

Robert S. LaRussa
Assistant Secretary
for Import Administration

Date

APPENDIX D

UNPUBLISHED

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 97-08-01344

TA CHEN STAINLESS STEEL PIPE, LTD.,

Plaintiff,

v.

THE UNITED STATES,
Defendant,
and
AVESTA SHEFFIELD, INC., et al.,
Defendant-Intervenors.

Dated: October 28, 1999

DISPOSITION:
Antidumping determination remanded.

COUNSEL:
Ablondi, Foster, Sobin & Davidow, p.c. (Joel Davidow and Peter Koenig) for plaintiff.

David W. Ogden, Acting Assistant Attorney General, David M. Cohen, Director, Velta A. Melnbrencis, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Mark L. Josephs),

Christine Savage, Office of the General Counsel, United States Department of Commerce, of counsel, for defendant.

Collier, Shannon, Rill & Scott, PLLC, (David A. Hartquist, Jeffrey S. Beckington, and Kathleen W. Cannon) for defendant-intervenors.

JUDGES:
Jane A. Restani, JUDGE.

OPINION:

Public Version

OPINION

RESTANI, Judge: This matter is before the court on a motion for judgment upon the agency record pursuant to USCIT Rule 56.2. Ta Chen Stainless Steel Pipe, Inc. ("Ta Chen" or "plaintiff") challenges certain aspects of an antidumping duty determination by the Department of Commerce ("Commerce" or "the Department"). See *Certain Welded Stainless Steel Pipe from Taiwan*, 62 Fed. Reg. 37,543 (Dep't Commerce 1997) (final results of admin. rev.) [hereinafter "Final Results"]. Avesta Sheffield Inc., Damascus Tube Division, Damascus-Bishop Tube Co., and United Steelworkers of America (AFL-CIO/CLC) appear as defendant-intervenors (collectively "Defendant-Intervenors" or "Domestic Interested Parties") to Ta Chen's motion.

In 1992, Commerce determined that welded stainless steel pipe ("WSSP") from Taiwan was being sold at less than fair value, and accordingly issued an antidumping order. *Certain Welded Stainless Steel Pipe from Taiwan*, 57 Fed. Reg. 62,300 (Dep't Commerce 1992) (amended final determination and antidumping duty order). In December 1995, Commerce published its notice of opportunity to request an administrative review of the dumping order for

the third administrative review period, covering December 1, 1994 through November 30, 1995. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation,* 60 Fed. Reg. 62,070, 62,071 (Dep't Commerce 1995). Ta Chen requested a review and Commerce initiated an antidumping duty administrative review of WSSP on February 1, 1996. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 61 Fed. Reg. 3,670, 3,671 (Dep't Commerce 1996).

Ta Chen received a dumping margin of 6.06 percent, which was based on partial adverse facts available. *Final Results*, 62 Fed. Reg. at 37,556. Ta Chen challenges several aspects of the determination leading to the application of adverse facts.

Jurisdiction and Standard of Review

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). In reviewing final determinations in antidumping duty investigations, the court will hold unlawful those agency determinations which are unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

I. Ta Chen's affiliation with Sun Stainless
Background

Ta Chen is a Taiwanese producer of stainless steel pipe. In its Final Results, Commerce concluded that, pursuant to 19 U.S.C. § 1677(33) (1994), Ta Chen was affiliated with one of its US distributors, Sun Stainless, Inc. ("Sun"), on the grounds of control.[1] *Final Results*, 62 Fed. Reg. at 37,549.

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[1] The name of Sun Stainless was confidential during the administrative proceedings, as was the name San Shing (dba "Sun

(footnote continued on next page)

Ta Chen disputes this finding and claims it is not affiliated with Sun.

In its first questionnaire, Commerce asked Ta Chen to list all companies affiliated with it, through stock ownership or otherwise. Initial Questionnaire (Feb. 13, 1996), at A-4, P.R. Doc. 6, Def.'s App., Tab 1, at 6. The definition of "affiliated person" in the questionnaire's glossary of terms simply restated the statutory definition. Id. at App. I, Def.'s App., Tab 1, at 10. The questionnaire also stated that Ta Chen should seek clarification from the Department if it was uncertain whether a company was an affiliate. Id. at G-6, Def.'s App., Tab 1, at 5. Commerce also asked Ta Chen to identify its sales as either export price ("EP") or constructed export price ("CEP").[2] Id. at C-8, Def.'s App., Tab 1, at 7.

(footnote continued from previous page)
Stainless"), Sun's predecessor. Ta Chen placed Sun Stainless' name on the public record for these proceedings. See Pl.'s Br. at 3 n.6. Ta Chen has since placed San Shing's name on the public record for the final results of the first and second administrative review. See *Certain Welded Stainless Steel Pipe from Taiwan*, 64 Fed. Reg. 33,243, 33,243 (Dep't Commerce 1999) (final results of admin. rev.).

In the Final Results, San Shing is referred to as Company A and Sun is referred to as Company B.

[2] Commerce generally calculates the antidumping duty by comparing an imported product's price in the United States to its normal value ("NV"), which represents the price of comparable merchandise in the exporting country. The dumping margin is the amount by which NV exceeds the US price. See 19 U.S.C. § 1673 (1994).

The US price is calculated as either EP or CEP. See 19 U.S.C. § 1677a (1994). Usually, EP is used when the foreign exporter sells directly to an unrelated US purchaser, and CEP is

(footnote continued on next page)

In its response, Ta Chen listed several affiliates, but did not include Sun. See Response to Initial Questionnaire (Apr. 30, 1996), at 7-8, C.R. Doc. 1, Def.'s App., Tab 2, at 4-5. Ta Chen said that none of its affiliates sold Ta Chen pipe in the United States or Taiwan during the 1994-95 period of review ("POR"), and that none of these affiliates were involved in any aspect of the production of pipe. Id. at 8, Def.'s App., Tab 2, at 5. Ta Chen also stated that its US pipe sales were EP sales, and not CEP sales, because the price and quantity for US sales was determined before the pipe was imported into the United States. Id. at 4, Def.'s App., Tab 2, at 2. Ta Chen said that its wholly-owned US subsidiary, Ta Chen International ("TCI"), performed no function in connection with Ta Chen's US pipe sales, other than processing paper work. Id. Ta Chen stated that pipe did not enter a TCI warehouse in the US, but was shipped directly from Ta Chen in Taiwan to the customer in the United States. Id.

In its first supplemental questionnaire, Commerce requested further information on a variety of issues, including a request that Ta Chen explain its relationship with Sun. First Supplemental Questionnaire (Oct. 22, 1996), at 7, C.R. Doc. 6, Def.'s App., Tab 3, at 3. Ta Chen responded that it had a history of doing business with Sun Stainless, and with San Shing. Response to First Supplemental Questionnaire (Nov. 12, 1996), at 34, C.R. Doc. 8, Def.'s App., Tab 4, at 2. Both companies had been distributors of Ta Chen pipe. Id. Ta Chen said that in answering Commerce's questions regarding Sun, it assumed that Commerce was seeking information to determine whether Ta

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used when the exporter sells through a related party in the United States which performs substantial selling functions. See 19 U.S.C. § 1677a(a)-(b).

Chen and Sun were affiliates. Id. at 35-36, Def.'s App., Tab 4, at 3-4. Prior to describing its relationship with Sun, Ta Chen included much legal argument in its response regarding the statutory and regulatory definitions of "related party" and "control." Id. at 36, Def.'s App., Tab 4, at 4. Ta Chen focused on the amendments made to these definitions in the Uruguay Round Agreements Act ("URAA"), Pub. L. 103-465, 108 Stat. 4809 (1994), effective January 1, 1995, and argued that Commerce should apply the pre-URAA statutory definition of related parties because the only sales Ta Chen had made to Sun in the third administrative review period occurred in August 1994.[3] Id. at 40-41, Def.'s App., Tab 4, at 8-9. Ta Chen does not pursue this argument before the court.

Ta Chen went on to describe a long history with San Shing and Sun Stainless. It described several connections between the companies which are listed in the Final Results as follows:-

- Sun was established by current or former managers and officers of Ta Chen;
- Sun was staffed by current or former Ta Chen employees;

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[3] The Department verified that after August 1994, Ta Chen had made no sales to Sun, but it had made shipments to Sun, which were imported during the POR in January 1995. Verification Report (June 19, 1997), at 4, C.R. Doc. 30, Def.'s App., Tab 8, at 4; Response to First Supplemental Questionnaire, at 41, Def.'s App., Tab 4, at 9.

The period of review covers entries, as well as exports or sales, made during the 12 month period at issue. See 19 C.F.R. § 353.22(b) (1996) & 19 C.F.R. § 351.213(e)(1)(i) (1999).

- Sun distributed only Ta Chen products in the United States;
- TCI had physical custody of Sun's signature stamp;
- TCI had a dedicated computer connection to Sun's records for purposes of credit monitoring;
- Ta Chen's president met with Sun's customers and participated directly in the negotiation of prices of Sun's resales of WSSP; and
- Sun offered its accounts receivable and inventory as collateral for a bank loan to TCI.

Final Results, 62 Fed. Reg. at 37,549. Ta Chen did not provide the Department with information on Sun's US sales in response to the first supplemental questionnaire.

In its second supplemental questionnaire, Commerce asked a series of follow-up questions regarding Ta Chen's relationship with Sun. Commerce wanted to know if Sun bought subject merchandise from any other companies, if any other companies had access to Sun's records, and further detail on Ta Chen's credit monitoring of Sun. Second Supplemental Questionnaire (Dec. 24, 1996), at 2-3, C.R. Doc. 15, Def.'s App., Tab 5, at 4-5. In this supplemental questionnaire Commerce did not ask Ta Chen to supply information on Sun's US sales, nor did it do so at any later point. Commerce also said that it had "made no determination in the first, second or third administrative reviews as to the proper classification of Ta Chen's U.S. sales." Id. at 3, Def.'s App., Tab 5, at 5.

When Commerce issued its Preliminary Results in January 1997, three days before Ta Chen responded to the second supplemental questionnaire, the Department preliminarily determined that an application of facts available was warranted for Ta Chen's US sales to Sun because Ta Chen had misreported this portion of its US sales as EP, instead of CEP sales. *Certain Welded Stainless Steel*

Pipe from Taiwan, 62 Fed. Reg. 1,435, 1,435 (Dep't Commerce 1997) [hereinafter "Preliminary Results"]. Commerce said that the additional information provided by Ta Chen clearly indicated that Sun and Ta Chen were affiliates pursuant to 19 U.S.C. § 1677(33)(G), because Ta Chen was in a position to control Sun, and that therefore Ta Chen's sales to Sun should have been classified as CEP sales.

In its response to the second supplemental questionnaire, Ta Chen answered Commerce's further questions about Sun. In particular, Ta Chen said that it had no reason to believe that Sun purchased WSSP from any one other than Ta Chen. Response to Second Supplemental Questionnaire (Jan. 13, 1997), at 9, C.R. Doc. 17, Def.'s App., Tab 6, at 2. Ta Chen also stated that it was not aware of any other company having computer access to Sun's records, and that Ta Chen did not have such access to other customers. Id. Ta Chen did not provide information on Sun's US sales at this point, nor did it do so at any other time.

Commerce conducted a verification of Ta Chen's US sales data at TCI's premises in Long Beach, California on June 11 and 12, 1997. Verification Report, at 1, Def.'s App., Tab 8, at 1 . Commerce issued the Final Results on July 14, 1997, and maintained its preliminary determination that Ta Chen was affiliated with Sun. Commerce calculated a margin based on partial adverse facts available, and applied the adverse inference only to a portion of Ta Chen's sales; i.e. the sales to Sun and to Anderson Alloys (see infra for discussion of Anderson). *Final Results*, 62 Fed. Reg. at 37,553. Ta Chen contests Commerce's conclusion that it is affiliated with Sun.

Discussion

Section 1677(33) of Title 19 sets out a list of persons who will be considered affiliated, including " Any person

who controls any other person and such other person .... [A] person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." 19 U.S.C. § 1677(33)(G).

The Statement of Administrative Action also states that "control" exists "if one person is legally or operationally in a position to exercise restraint or direction over another person." Statement of Administrative Action, accompanying H.R. 103-5110 at 168 (1994), reprinted in 1994 U.S.C.C.A.N. 3773, 4174 ("SAA").[4] The SAA explains that this definition of control is a shift from the prior definition.

> The traditional focus on control through stock ownership fails to address adequately modern business arrangements, which often find one firm "operationally in a position to exercise restraint or direction" over another even in the absence of an equity relationship. A company may be in a position to exercise restraint or direction, for example, through corporate or family groupings, franchises or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other.

SAA at 168, 1994 U.S.C.C.A.N. at 4174-75.

Commerce's regulations adopted the statutory definition of "affiliated persons." See 19 C.F.R. § 351.102(b) (1999)

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[4] The Statement of Administrative Action represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round Agreements .... The Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this statement." SAA at 1, 1994 U.S.C.C.A.N. at 4040.

("Affiliated persons" and "affiliated parties" have the same meaning as in section 771(33) of the Act [19 U.S.C. § 1677(33)].") In its Notice of Proposed Rulemaking, Commerce explained that "affiliated persons" is a new term, and declined to elaborate on the meaning of either "control" or "affiliated persons." *Antidumping Duties; Countervailing Duties,* 61 Fed. Reg. 7,308, 7,310 (Dep't Commerce 1996) (notice of proposed rulemaking and request for public comments) (proposed regulations to conform to the URAA). In its final rules, Commerce said it would not find that control existed on the basis of "corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships ... unless the relationship has the potential to impact decisions concerning the production, pricing or cost of the subject merchandise." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,380 (Dep't Commerce 1997) (final rules) ["Final Rules"].[5] In the comments to these rules, however, Commerce specifically declined to provide further detail on the new affiliation or control standard, stating that it was "more appropriate" for Commerce to develop its practice regarding affiliation "through the adjudication of actual cases." Id. at 27,297. The Department stated that it agreed that it should focus on "relationships that have the potential to impact decisions concerning production, pricing or cost," but that this did not mean that "proof is required that a

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[5] This rule was codified at 19 C.F.R. § 351.102. These regulations, implemented to conform to the URAA, became applicable as of July 1, 1997. See *Final Rules*, 62 Fed. Reg. at 27,417. For reviews such as the third administrative review period for Ta Chen, initiated after January 1, 1995 but before the rules came into effect, the Department stated that the final rules would "serve as a restatement of the Department's interpretation of the requirements of the Act as amended by the URAA." Id.

relationship in fact has had such an impact." Id. at 27,297-98.

A) Ta Chen's connections with Sun Stainless

Ta Chen argues that none of its connections with Sun placed it in a position to impact Sun's decisions concerning the pricing of WSSP and, therefore, that Ta Chen and Sun should not be considered affiliated parties.

1) Ta Chen and Sun's historical ties

The Department found that Sun was established by current or former managers and officers of Ta Chen, "at Ta Chen's behest." *Final Results*, 62 Fed. Reg. at 37,549. Frank McLane,[6] a member of Ta Chen's board of directors incorporated Sun Stainless in the fall of 1993. Response to First Supplemental Questionnaire, at 55, Def.'s App., Tab 4, at 22. Sun became operational in November 1993, and Mr. McLane resigned from Ta Chen's board and sold his Ta Chen stock before Sun "began dealing with Ta Chen."[7] Id. A former TCI sales consultant, Ken Mayes,[8] was principal in

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[6] Frank McLane's name was considered confidential during the third administrative review period, but was subsequently placed on the public record in the final results of the first and second administrative review. See *Certain Welded Stainless Steel Pipe from Taiwan.*

[7] The Government states that Mr. McLane did not sell his Ta Chen stock and resign from the board until after the incorporation of Sun. Gov't Br. at 22-23. The exact dates, however; are unclear from the record. See Response to First Supplemental Questionnaire, at 55-56, Def.'s App., Tab 4, at 22-23.

[8] Ken Mayes' name was also considered confidential during the third administrative review period, but was placed on the public

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charge of San Shing at the time San Shing took over TCI's inventories and pipe distribution in 1992, and was retained as the principal in charge of Sun Stainless when Sun bought out San Shing. Id. at 50-56, Def.'s App., Tab 4, at 18-23. Commerce concluded that "given the longstanding and intimate business dealings between [Ken Mayes] and the president of Ta Chen, we must question the degree of operational autonomy of [San Shing] and [Sun] while under this individual's stewardship." *Final Results*, 62 Fed. Reg. at 37,549.

Ta Chen argues that even if it had a historical affiliation with Sun, the fact that parties were previously affiliated is irrelevant to the question of whether they are currently affiliated. See *Certain Iron Construction Castings from Canada,* 55 Fed. Reg. 460, 460 (Dep't Commerce 1990) (final results of antidumping duty admin. rev.) (fact that respondent sold its interest in possible related party prior to initiation of review was one reason, among others, that ITA declined to make a finding of relatedness). Certainly the existence of a prior affiliation should not be dispositive in making a determination regarding current affiliation. Ken Mayes' intimate knowledge of TCI and Sun's operations may have called into doubt the operational autonomy of San Shing and Sun, but this factor alone does not constitute substantial evidence that Ta Chen controlled either San Shing or Sun. Likewise, the details of Frank McLane's relationship with Ta Chen at the time he incorporated Sun are unclear from the record, and are insufficient to support a finding of affiliation.

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record for the final results of the first and second administrative review. See *Certain Welded Stainless Steel Pipe from Taiwan*, 64 Fed. Reg. at 33,244.

2) Staffing of Sun by current or former Ta Chen employees

Commerce found that Sun was staffed entirely by current or former employees of Ta Chen. *Final Results*, 62 Fed. Reg. at 37,549. Ta Chen disputes this conclusion and says that no individuals were employed by Ta Chen and Sun at the same time. Pl.'s Br. at 53.

Regarding allegedly common clerical staff, Ta Chen argues that it had a surplus of clerical staff when TCI gave up its US inventory sales business. Ta Chen says that some of these individuals were hired by Sun. Id. at 54-55. Ta Chen admits that it did provide Sun with some "routine clerical assistance and training, use of office equipment, suggestions on working with customs brokers, training on shipping procedures, and data entry and bookkeeping type assistance." Id. at 55. The staff who provided such assistance allegedly were never employees of Sun, but rather acted on Ta Chen's behalf for Ta Chen's benefit.

Ta Chen argues in this regard that the movement of employees is irrelevant to the question of whether companies are affiliates. See *Oil Country Tubular Goods from Argentina*, 60 Fed. Reg. 33,539, 33,544 (Dep't Commerce 1995) (final determination of sales at LTFV) (finding that a common employee/consultant is "not the same thing as board membership and is not enough to establish control"); see also *Certain Fresh Cut Flowers from Mexico*, 56 Fed. Reg. 1,794, 1,799 (Dep't Commerce 1991) (final results of antidumping duty admin. rev.) (shared address, phone number, and invoice forms of two foreign importers not sufficient to lead to finding of relatedness).

The Department also considered that Ken Mayes had been a common employee of Ta Chen and Sun, and that he had received compensation from Ta Chen after the end of his employment with Ta Chen in 1992. *Final Results*, 62 Fed. Reg. at 37,549. Ta Chen counters that Ken Mayes was an

independent contractor with Ta Chen, and that he had been at liberty to work for others even while he was retained by Ta Chen. Pl.'s Br. at 53. Moreover, Ta Chen states that Ken Mayes' independent contractor agreement terminated prior to his employment with San Shing and Sun. Id. Ta Chen says that the payment to Ken Mayes was not made until Mayes had left Sun, and that this sum represented a one time payment which Ta Chen owed Ken Mayes pursuant to their earlier contract. Id. at 54. The Department has previously stated that the right to a one-time profit sharing conveys no ownership right or control in a company. See *Porcelain-on-Steel Cookware from Mexico*, 62 Fed. Reg. 25,908, 25,914 (Dep't Commerce 1997) (final results of antidumping duty admin. rev.) (Department included respondent's profit-sharing expenses in COP analysis as an expense, but distinguished these expenses from dividends, because "right to participate in profit-sharing conveyed no ownership right in [respondent company]"). Accordingly, Mayes' right to a payment by Ta Chen by itself does not suffice to establish a control relationship.

The Government argues that the history of common personnel supports the conclusion that Ta Chen had the ability to exercise "operational direction or restraint" over Sun. Gov't Br. at 23-24. In light of Oil Country Tubular and Certain Fresh Cut Flowers, however, it is unlikely that the existence of common clerical staff could, on its own, suffice to support the Department's finding of control. This is particularly so here because Commerce did not articulate how Ta Chen could have used the alleged common staff to direct or restrain Sun.

3) Sun's distribution of only Ta Chen products

Another of the Department's reasons for concluding that Ta Chen and Sun were affiliates was the fact that Sun distributed only Ta Chen products in the United States.

Final Results, 62 Fed. Reg. at 37,549. The Department reasoned that this was akin to a close supplier relationship, which is a factor specifically mentioned in both the SAA and the Department's regulations as indicative of control. Ta Chen argued before Commerce, as it does here, that although Sun bought all of its stainless steel pipe from Ta Chen, Sun was at liberty to buy from other producers. *Final Results*, 62 Fed. Reg. at 37,550; Pl.'s Br. at 51.

Ta Chen says there was no exclusivity agreement with Sun. Further, it argues that even in the presence of such exclusive agreements, Commerce recognizes that such contracts are "common commercial arrangements," and that affiliated party status does not necessarily arise from a customer buying all of its product from one supplier. See *Certain Cold-Rolled and Corrosion- Resistant Carbon Steel Flat Products from Korea*, 62 Fed. Reg. 18,404, 18,441 (Dep't Commerce 1997) (final results of antidumping duty admin. revs.) (respondent did not control the home-market distributor because there was no evidence that distributor entered into exclusive sales contract other than voluntarily, or that the contract could not be terminated by either party). In *Open-End Spun Rayon Singles Yarn from Austria*, 62 Fed. Reg. 43,701 (Dep't Commerce 1997) (notice of final determination of sales at LTFV), the Department did not find that the respondent and its sole US customer of subject merchandise were affiliates. The Department reasoned that because the respondent's records showed that its US customer's purchases "account for only a small portion of [respondent's] total sales revenue," the respondent was not reliant on this US customer. 62 Fed. Reg. at 43,708.

Commerce responds that a finding of affiliation can be based on a close supplier relationship alone. The Government cites *Stainless Steel Wire Rod from Korea*, 63 Fed. Reg. 40,404 (Dep't Commerce 1998) (notice of final determination of sales at LTFV), where the Department

found that the sole supplier, and the sole buyer, of the major input for the production of the subject merchandise were affiliated because the supplier was in a position to control the buyer. 63 Fed. Reg. at 40,410. The buyer, by its own admission, had been unable to develop an alternate source to supply the input. "Thus, the business and economic reality is that the relationship between the parties is significant and, as demonstrated by evidence on the record, not easily replaced." Id.; see also *Mitsubishi Heavy Indus., Ltd. v. United States,* 54 F. Supp. 2d 1183, 1190-91 (Ct. Int'l Trade 1999) (sustaining Commerce's determination that "any supplier that depended upon [buyer] for 50 percent or more of its sales during each year during a five year period [would] be potentially subject to the restraint or direction of [the buyer]" was reasonable interpretation of term "close-supplier"); but cf. *Furfuryl Alcohol from the Republic of South Africa,* 62 Fed. Reg. 61,084, 61,086 (Dep't Commerce 1997) (final results of antidumping duty admin. rev.) (producer and seller not affiliated with its home market customers even though producer was the only manufacturer of subject merchandise in South Africa; Department stated that producer's dominant position in the home market "in and of itself" was not sufficient for a finding of affiliation between producer and its customers).

Given the inclusion of close-supplier relationships in the SAA and the Department's regulations, Commerce's decision to consider the fact that Sun purchased WSSP exclusively from Ta Chen as one factor, among others, as demonstrating Ta Chen's ability to control Sun, was reasonable. Moreover, the determinations Ta Chen cites in support of its position that exclusive sales agreements and close supplier relationships are not sufficient to lead to a finding of affiliation did not involve as many connections between the companies as Commerce found between Ta Chen and Sun. If the affiliation finding hinged on this factor

alone, however, the court would be reluctant to uphold the determination as based on substantial evidence. In this case there was no exclusive sales contract, and even when there are exclusive sales contracts, Commerce has found that insufficient for an affiliation finding. *See Certain Cold-Rolled Carbon Steel Flat Products,* 62 Fed. Reg. at 18,441. When the court upheld Commerce's determination based on the "greater-than-fifty-percent-sales-dependence-for-five years" in Mitsubishi, the court noted that the subject merchandise was a "highly customized product, requiring unique technical specifications." *Mitsubishi,* 54 F. Supp. 2d at 1191. By contrast, there is no suggestion in this case that Sun would have had difficulty obtaining WSSP from other suppliers. Nonetheless, this is one factor that may be considered by Commerce.

4) TCI's custody of Sun's signature stamp

Commerce stated that TCI's physical custody of Sun's signature stamp constituted prima facie evidence that Ta Chen either "exercised, or was in a position to exercise, control over [Sun's] disbursements." *Final Results*, 62 Fed. Reg. at 37,549. Ta Chen argues against the Department's conclusion regarding this stamp, stating that TCI had this stamp in order to monitor Sun's cash outflows. Pl.'s Br. at 58. Ta Chen further states that it sold Sun a large volume of product on extended payment terms, and that therefore TCI's accounts receivable from Sun "came to be one of TCI's most significant assets." Id. Ta Chen says "it was precisely because Ta Chen did not control Sun that stringent credit monitoring measures were sought. The monitoring could provide early warning of cash flow problems which could adversely affect ability to pay debt." Id. at 58-59.

Commerce considered Ta Chen's arguments regarding the reasons why it possessed Sun's signature stamp and concluded that Ta Chen had not presented evidence to

counter the presumption that it was in a position to control Sun's disbursements. *Final Results*, 62 Fed. Reg. at 37,549. Ta Chen says TCI only stamped checks which were pre-approved by Sun, and that Sun could write its own checks. Pl.'s Br. at 58. There is no discussion, however, of whether Ta Chen had the right to withhold stamping Sun checks. There is also no record evidence of a written agreement between Ta Chen and Sun regarding Ta Chen's use and possession of Sun's stamp. Possession of the signature stamp provided TCI with the means to control Sun's outflows, whether TCI exercised that power or not. The statute focuses on the capacity to control, rather than on the actual exercise of control. See *Ferro Union, Inc. v. United States,* 44 F. Supp. 2d 1310, 1324 (Ct. Int'l Trade 1999) (determination of "control" under URAA "not dependent on actually exercising control, but rather on the capacity to exercise control") (emphasis in original). The court therefore concludes that the Department's reasoning that possession of the signature stamp provided Ta Chen with the capacity to control Sun's disbursements was substantially supported.

5) Ta Chen's credit monitoring of Sun

The Department also considered as indicative of control the fact that Ta Chen, through TCI, had a dedicated computer connection to Sun's accounts receivable, accounts payable, and inventory. This access was on a full-time, unlimited basis, which required no passwords or other security mechanisms limiting Ta Chen's access to Sun's records. *Final Results*, 62 Fed. Reg. at 37,549; Verification Report, at 5. Def.'s App., Tab 8, at 5.

Ta Chen argues that its credit monitoring of Sun via TCI's possession of Sun's signature stamp was imperfect, and that therefore Ta Chen needed another way to monitor Sun's credit. Pl.'s Br. at 59. Ta Chen submitted a certified

statement from an expert in the US steel industry who asserted that, in light of Sun's purchasing of a large volume of product on extended payment terms, the credit monitoring exercised by Ta Chen was not inappropriate between unaffiliated parties. Response to Second Supplemental Questionnaire, at 41-42, C.R. Doc. 17, Pl.'s Prop. App., Tab C, at 15-16. Ta Chen also notes a comment to UCC § 9-205 (1999) which says that "policing" or "dominion" by the secured party of its unaffiliated debtor is permissible and expected.[9] Ta Chen also alleges that Commerce's conclusion that Ta Chen's computer access to Sun's records was indicative of control is "speculative" because Commerce did not cite evidence as to why unaffiliated parties would never agree to such credit monitoring.

Ta Chen is misstating the Department's analysis of this issue. Commerce conceded that it is common for creditors to "obtain reports regarding the status of a debtor's business activities," but contended that the "full-time and unlimited access to [Sun's] computer system afforded Ta Chen a far more invasive mechanism for monitoring than would be expected between unaffiliated parties." *Final Results*, 62 Fed. Reg. at 37,549. The court finds that Commerce did not base its affiliation finding simply on the fact that Ta Chen monitored Sun's records, but rather on the means with which

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[9] Ta Chen is referring to an official comment to UCC § 9-205 which states that nothing in the section "prevents ... 'policing' or dominion as the secured party and the debtor may agree upon; business and not legal reasons will determine the extent to which strict accountability, segregation of collections, daily reports and the like will be employed." Comment 5 to UCC § 9-205.

A finding of affiliation, however, is not inconsistent with secured status. Whether such monitoring is legally permissible is irrelevant to the affiliation determination.

Ta Chen effectuated its monitoring. Ta Chen's unlimited access to Sun's accounts does seem highly invasive, and Commerce's conclusion that this monitoring was more invasive than the type which would normally exist between unaffiliated parties was substantially supported.

6) Participation by Ta Chen president in meetings with Sun customers and negotiation of prices of Sun's resales of WSSP

The Department also focused on the fact that Robert Shieh, the president of Ta Chen, met with Sun's customers and participated in the negotiation of Sun's resales of WSSP, to conclude that Ta Chen and Sun were affiliates. *Final Results,* 62 Fed. Reg. at 37,549. Commerce found that "Ta Chen's statement that 'it knew the prices which would be accepted by [Sun]' raised additional questions about the extent to which [Sun] was free to act in its own interest." Id.

Ta Chen explains that when a customer wanted to buy WSSP at a price acceptable to Sun, Ta Chen would tell the customer to prepare a purchase order for Sun. Pl.'s Br. at 48. The customer would then either send its order directly to Sun, or give it to Ta Chen, who would forward the order to Sun. Id. Ta Chen says Sun was free to accept, reject, or modify these orders. Id. Ta Chen submitted the testimony of a US steel industry expert to support its argument that such behavior by Ta Chen was standard industry practice. Response to Second Supplemental Questionnaire, at 44, C.R. Doc. 17, Pl.'s Prop. App., Tab C, at 18. This expert stated that mill officials visit their unaffiliated distributors' customers and forward the orders, so as not to undermine their distributors by taking the order directly from the distributor's customers. Id.

Ta Chen may be correct in arguing that Mr. Shieh's visits to Sun's customers is standard industry practice. Such visits do, however, raise a well-founded suspicion that Ta

Chen had a great deal of access to Sun's pricing information. For instance, how could Ta Chen assure a seller that a particular price was acceptable to Sun, unless Ta Chen had intimate knowledge of Sun's pricing and cost decisions? Moreover, simply because certain behavior is standard industry practice does not mean it negates a finding of control. See *Final Rules*, 62 Fed. Reg. at 27,298 (declining to adopt suggestion that Department should not consider "normal commercial relationships" as evidence of control; relationships described in SAA as giving rise to control "can be characterized as 'normal' in the sense that they are commercial relationships commonly entered into by firms. Nevertheless ... the SAA indicates that they can give rise to control"). Mr. Shieh's ability to set the prices for Sun's resales directly implicates Ta Chen's ability to affect Sun's pricing decisions, in accordance with Commerce's regulatory definition of affiliated parties. See 19 C.F.R. § 351.102. The court therefore concludes that this factor was a strong indicator of Ta Chen's ability to control Sun.

7) Debt financing

Commerce's decision that Sun and Ta Chen were affiliated also depended on the debt financing arrangement agreed to by Sun. See *Final Results*, 62 Fed. Reg. at 37,549. Commerce found that whether Sun "offered" its accounts receivable and inventory as collateral for a bank loan to TCI, or whether TCI requested that it do so, was not germane to its analysis. "Either way ... [Sun] 'placed its continued ability to operate in the hands of a putatively unaffiliated party.'" Id. (quoting *Preliminary Results*, 62 Fed. Reg. at 1,436.)

In response to Commerce's first supplemental questionnaire, Ta Chen explained that in June of 1993, it sought to maintain a line of credit with its bank for an amount comparable to the amount of TCI's accounts

receivable from San Shing.[10] Response to First Supplemental Questionnaire, at 57, Def.'s App., Tab 4, at 24. Ta Chen says that TCI consented to a UCC lien in all of its accounts receivable, "a significant portion of which was owed by San Shing." Id. In this response, Ta Chen suggested that in order to obtain a more favorable interest rate, San Shing, and subsequently Sun Stainless, provided the bank with the UCC lien on its inventory and accounts receivable directly. Id. Ta Chen states that later TCI asked Sun to grant the lien directly, as a way to "simplify a still otherwise ordinary commercial arrangement."[11] Pl.'s Br. at 63. Ta Chen says that the security lien was limited to the unpaid amount which Sun owed Ta Chen for product sold, and that this limitation was stated in side letter agreements. Id. The Final Results state that the agreement between Ta Chen/TCI and Sun was not in writing. Ta Chen claims that the side letter agreements did exist, and stated at oral argument that these were available to the Department at verification, but that the verifiers chose not to look at them. In its response to the supplemental questionnaire, however,

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[10] TCI's accounts receivable from San Shing were [ ] million and it sought a line of credit with its bank of [ ] million. Response to First Supplemental Questionnaire, at 57, Def.'s App., Tab 4, at 24.

[11] Ta Chen cites Commerce's determination in *Polyvinyl Alcohol from Taiwan*, 62 Fed. Reg. 54,823 (Dep't Commerce 1997) (notice of termination of new shipper review), as an example of a customer granting a security interest in its accounts payable to a supplier, without this constituting debt financing that leads to a finding of affiliation. The court has trouble seeing how Ta Chen draws this conclusion from this determination. Commerce stated that the debt financing at issue in Polyvinyl did not establish a control relationship, but the particulars of the debt financing are not explained in the determination. See *Polyvinyl*, 62 Fed. Reg. at 54,824.

Ta Chen specifically stated that it had been unable to find any written statement memorializing the terms of the agreement, but that "the amount of the TCI take down on its line of credit was to be, and always was, less than the amount owed to TCI by [San Shing or Sun]." Response to First Supplemental Questionnaire, at 57-58, Def.'s App., Tab 4, at 24-25. The court is thus uncertain whether a written agreement did exist, but finds it unnecessary to resolve the issue. The particulars of the debt financing suffice to support Commerce's conclusion that it was indicative of a control relationship.

Similar to its arguments regarding Robert Shieh's negotiations with Sun's customers, Ta Chen states that there was nothing unusual about this debt financing arrangement.[12] Ta Chen also argues that the Department normally bases its understanding of the relationship between parties on how the parties themselves treat their relationship in their financial statements. See *Melamine Institutional Dinnerware Products from Taiwan,* 62 Fed. Reg. 1,726, 1,731 (Dep't Commerce 1997) (notice of final determination of sales at LTFV) (where Department classified amounts as long-term loans "consistent with the treatment in the respondent's financial statement"). Because TCI's audited financial statements do not include a loan from Sun in its list of loan guarantees received from third parties, and because the auditors did not list Sun as an affiliated party in TCI's audited financial statements, Ta Chen argues that the

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[12] Ta Chen again provided Commerce with the opinion of a US steel industry expert who found that Ta Chen's method of securing payment from Sun was "a perfectly normal arrangement between unaffiliated parties." Pl.'s Br. at 65-66; see also Response to Second Supplemental Questionnaire, at 41-42, Pl.'s Prop. App., Tab C, at 15-16.

Department should have deferred to this characterization of their relationship. Pl.'s Br. at 66; see also Response to First Supplemental Questionnaire, at 69, Pl.'s Prop. App., Tab A, at 37.

Ta Chen overlooks the fact that the original debt financing agreement was entered into with Sun's predecessor, San Shing, and then apparently continued with Sun. This gives rise to the question of why a new entity, Sun, would agree to take on such a risk with a putatively unaffiliated company. Ta Chen also minimizes aspects of the debt financing agreement which concerned Commerce. Commerce explicitly disagreed with Ta Chen's argument that Sun's pledging of its accounts receivable and inventory to TCI "was essentially akin to TCI securing a lien upon [Sun] and, in turn assigning its rights to the bank." *Final Results,* 62 Fed. Reg. at 37,550. Commerce explained:

> the actual transaction involved a significant qualitative difference. In the latter case, TCI's security interest would be limited to the amount [Sun] owed against purchases of inventory. In the former case, [Sun] unilaterally, and without consideration, assigned its entire inventory and accounts receivable directly to TCI's bank to facilitate a loan for TCI. That [Sun] would accept this risk without any consideration - without even a written agreement memorializing the terms and duration of the agreement - does not comport with the commercial realities of dealings between unaffiliated companies.

Id. Ta Chen argues that the consideration for Sun to enter into the agreement was the extended payment terms Ta Chen gave Sun on a large volume of product. From the record, however, it appears that Sun had already obtained the favorable credit terms prior to agreeing to this loan agreement. Indeed, Ta Chen stated that a significant portion

of its accounts receivable, prior to seeking the loan, were owed to it by San Shing as a consequence of Ta Chen's large volume of sales to San Shing and the extended credit terms for payments. Response to First Supplemental Questionnaire, at 56-57, Def.'s App., Tab 4 at 23-24. The court therefore finds supported Commerce's conclusion that Sun agreed to offer its inventory and accounts receivable as collateral for TCI's loan without adequate consideration.

8) Factors considered as a whole

The court finds that Commerce's determination that Ta Chen controlled Sun is supported by substantial evidence. Even if each of the individual connections between Ta Chen and Sun, standing a lone, may not be sufficient to establish control, Commerce's conclusion that the numerous connections between Ta Chen and Sun were indicative of control was reasonable. Commerce did not rely on any one factor in concluding that Ta Chen and Sun were affiliated parties, rather, it determined that the combination of factors was sufficient proof of affiliation.

Ta Chen argues that Sun paid competitive and negotiated prices for Ta Chen pipe, and that Sun was a profitable company which was sold for a profit. Ta Chen argues that if it were really affiliated with Sun, it would not have sold WSSP to Sun at a lower price and that no one would have been interested in purchasing a company affiliated with another. Pl.'s Br. at 47. Commerce responded to this at oral argument by stating that Ta Chen could have been establishing Sun's future market. Although this response is not completely satisfactory, the possibility of drawing inconsistent conclusions from the evidence does not render it unsupported by substantial evidence. See *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620, 16 L. Ed. 2d 131, 86 S. Ct. 1018 (1966) ("possibility of drawing two inconsistent conclusions from the evidence does not prevent

an administrative agency's finding from being supported by substantial evidence") (citations omitted).

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477, 95 L. Ed. 456, 71 S. Ct. 456 (1951) (citation omitted). Even if the court, deciding the issue anew, concluded that Ta Chen and Sun were not affiliates, Commerce's determination would not be overturned "merely because the plaintiff 'is able to produce evidence ... in support of its own contentions,'" rather, the plaintiff's evidence "must be enough to convince the Court that a reasonable mind would not have found [Commerce's] evidence sufficient to support its conclusion." *Torrington Co. v. United States,* 14 C.I.T. 507, 513-14, 745 F. Supp. 718, 723 (1990) (quoting *Hercules, Inc. v. United States*, 11 C.I.T. 710, 755, 673 F. Supp. 454, 490 (1987)).

Ta Chen's evidence is not sufficiently convincing for the court to conclude that a reasonable mind would not find Commerce's evidence sufficient to support the affiliation finding. Given the numerous financial connections and opportunities for control between Ta Chen and Sun, and Ta Chen's access to Sun's pricing information, as well as its participation in the negotiation of Sun's sales of WSSP, the court concludes that Commerce's determination that Ta Chen controlled Sun was supported by substantial evidence. Therefore, Commerce's determination that Ta Chen and Sun were affiliated parties is sustained.

B) Failure to provide adequate notice

The court does not find, however, that Commerce's decision to apply facts available was made in accordance with law. Based on its affiliation finding, Commerce concluded that Ta Chen's sales to Sun should be classified as CEP sales, and applied an adverse facts available margin to

these sales because Ta Chen did not provide information on Sun's US sales. The Department, however, never specifically requested this information. When Ta Chen learned that the Department would classify its sales as CEP, the time for Ta Chen to place unsolicited information on the record had passed.

Commerce argues that the questions in its original questionnaire informed Ta Chen that, in general, it needed to provide US sales information for its affiliated resellers. Gov't Br. at 33-34. This argument minimizes the fact that Commerce specifically told Ta Chen in the second supplemental questionnaire that it had not yet decided how to classify Ta Chen's US sales. See Second Supplemental Questionnaire, at 3, Def.'s App., Tab 5, at 5 . Commerce must have been aware when it issued this second supplemental questionnaire on December 24, 1996 that there was a possibility that it would treat Ta Chen and Sun as affiliates, given that it made such a determination in the Preliminary Results, issued two weeks later on January 10, 1997. Commerce could therefore foresee that in order to properly calculate Ta Chen's sales as CEP sales, it would need information on Sun's US sales. But Commerce did not ask for this information specifically. In fact, it appears to have tried to avoid giving Ta Chen a belated chance to amend.

Commerce has a statutory obligation to provide respondents with a chance to remedy deficient submissions. See 19 U.S.C. § 1677m(d) (1994). The statute provides in relevant part:

> If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority ... shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the

> extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle.

Commerce did not provide Ta Chen with such a remedial opportunity to place information of Sun's US sales on the record in this review. Commerce implies that Ta Chen could have provided the information on Sun's US sales after the issuance of the preliminary results. Gov't Br. at 40. The time for Ta Chen to provide unsolicited information, however, had already passed. See 19 C.F.R. § 353.31(a)(ii) (1996) (submission of factual information to be submitted not later than "the earlier of the date of publication of notice of preliminary results of review or 180 days after the date of publication of notice of initiation of the review").[13] The initiation of the review in this case was published on February 1, 1996, which would have required Ta Chen to submit all factual information by August 1, 1996, six months before Ta Chen was informed that the Department would consider its sales to Sun as CEP sales.

The failure by Commerce to provide respondents with sufficient notice can render the decision "unsupported by substantial evidence and otherwise contrary to law." *Usinor Sacilor v. United States,* 19 C.I.T. 711, 745, 893 F. Supp. 1112, 1141-42 (1995) (Department failed to notify plaintiff

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[13] The current version of this regulation provides that submission of factual information is due no later than "[for] the final results of an administrative review, 140 days after the last day of the anniversary month, except that factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed." 19 C.F.R. § 351.301(b)(2) (1999).

that it lacked necessary information to assess likely effects of subsidy program in countervailing duty case; plaintiffs not aware of deficiency until issuance of final results), aff'd in part and rev'd in part, 1999 U.S. App. LEXIS 20070, 1999 WL 641231 (Fed. Cir. Aug. 24, 1999). In Usinor, the court found that broad questions initially asked of plaintiff did not "discharge [Commerce] from its obligation to put parties on notice as to the deficiencies in their responses." Id. The court will not endorse "an investigation where [Commerce] sent out a general questionnaire and a brief deficiency letter, then effectively retreated into its bureaucratic shell, poised to penalize [respondent] for deficiencies not specified in the letter that [Commerce] would only disclose after it was too late, i.e., after the preliminary determination." *Bowe-Passat v. United States*, 17 C.I.T. 335, 343 (1993).

Although Ta Chen, unlike the respondent in Bowe-Passat, did not try to provide the missing information after the preliminary results, Commerce has behaved in the same way as it did in Bowe-Passat by failing to notify the respondent of the deficiency when it had an opportunity to do so, prior to issuing the preliminary results. Commerce's preliminary determination that Ta Chen and Sun were affiliated, and its decision to apply an adverse margin because Ta Chen failed to provide information on Sun's US sales, does not constitute notice pursuant to 19 U.S.C. § 1677m(d). Although it is not completely clear that the Department would have rejected the information had Ta Chen tried to submit it after the preliminary results, Commerce's less than open approach to Ta Chen indicates rejection was likely. At oral argument, the government argued that Ta Chen was required to ask the Department to ask Ta Chen to provide Sun's US sales information. But it is Commerce, not the respondent, which bears the burden of asking questions. See *NSK Ltd. v. United States,* 19 C.I.T. 1319, 1328, 910 F. Supp. 663, 671 (1995) ("respondents

should not be required to guess the parameters of Commerce's interpretation of a phrase in the statute.")

Commerce grounds its argument on the truism that the respondent has the burden of creating an accurate record. See *Chinsung Indus. Co. v. United States,* 13 C.I.T. 103, 106, 705 F. Supp. 598, 601 (1989) (burden of creating an adequate record rests with respondents). This truism, however, cannot obviate Commerce's obligation to let the respondent know what information it really wants. See *Queen's Flowers de Colombia v. United States,* 21 C.I.T. 968, 981 F. Supp. 617, 628 (Ct. Int'l Trade 1997) ("alleged response deficiency cannot support application of [best information available] where the information sought was apparently never requested.") (citation omitted).

Commerce has an obligation to make the questions affected by affiliation issues clear, in light of its own recognition that affiliation is a complex concept and its decision to develop its practice in this area on a case by case basis.[14] See *Final Rules*, 62 Fed. Reg. at 27,297. Commerce must therefore assure itself that it has asked questions sufficient to provide it with enough information to make both

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[14] Commerce stated in the Final Results that by the time of this review, Ta Chen must have had an understanding of affiliation. Final Results, 62 Fed. Reg. at 37,552. Although the URAA went into effect in January 1995, Commerce did not issue its final regulations to comport with the new statute until 1997, and the third administrative review of Ta Chen began in 1996. The court therefore cannot conclude that a respondent in Ta Chen's situation could be expected to have a thorough understanding of how Commerce would apply the new affiliation standard, where Commerce itself said that it would develop its affiliation practice, "through the adjudication of actual cases." *Final Rules*, 62 Fed. Reg. at 27,297.

the affiliation determination itself and the resulting determinations. In this case Ta Chen had a good basis to argue that it did not control Sun and it made that argument to Commerce. If a respondent reasonably believes it is not affiliated with its reseller, and therefore that it has EP rather than CEP sales, then it has a reason not to submit information on the subject reseller's US sales until Commerce tells the respondent that it wants the information on the particular reseller or until Commerce's questions are clear enough that the respondent knows what it should submit.[15] In this situation where a new statute was not fully explained and Commerce suspected that it would make a finding of affiliation between the importer and the US reseller, it should have placed the respondent on notice, specifically requested information on that reseller's US sales, and requested any other information necessary to the CEP calculation. If Commerce wishes to place the full burden of error of an affiliation assessment on the respondent, at a minimum it must make that clear, otherwise this is simply another instance of error which respondents must have an opportunity to correct under 19 U.S.C. § 1677m(d).[16]

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[15] Contrast this fact situation with that of respondent in *Pohang Iron and Steel Co. v. United States,* 1999 Ct. Intl. Trade LEXIS 105, No. 98-04-00906, 1999 WL 970743, at *15 (Ct. Int'l Trade Oct. 20, 1999) (Commerce twice asked for specific information necessary to calculate CEP and respondent specifically declined to provide data on basis EP applied).

[16] Even if Commerce's procedures and questions are clear, this may be insufficient to prevent Commerce from having to provide a respondent with the opportunity to remedy a deficient submission when it discovers the omission early enough for remediation to occur. Defendant made clear that it was not arguing that the statute allows an exception to the opportunity for correction provision based on inexcusable neglect or willful hiding of

(footnote continued on next page)

Commerce may not use Ta Chen's failure to submit Sun's US sales information as justification for an application of adverse facts available. On remand, Commerce must provide Ta Chen an opportunity to supply the information on Sun's US sales.

II. Purported sales to Company C

Background

In the Final Results, Commerce concluded that Ta Chen failed to report commissions to one of its US customers, Anderson Alloys,[17] on sales purportedly made to one of its US Customers, Company C.[18] *Final Results*, 62 Fed. Reg. at 37,544. Commerce concluded that Ta Chen misreported an unknown number of sales to this customer and decided to apply adverse facts available to all of Ta Chen's sales made to Anderson. Id. Commerce stated that Ta Chen had not acted to the best of its ability, and that Ta Chen's reported data did not permit Commerce to segregate the misreported sales for purposes of calculating the final margin. Id.

Commerce's initial questionnaire requested that Ta Chen report the unit cost of commissions paid to affiliated and unaffiliated selling agents, and to describe the terms

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(footnote continued from previous page)
information. This may be a defect in the statute which Commerce is seeking to offset. In any case, as the requisite clarity was not present here, the court does not address this issue.

[17] Subsequent to the issuance of the Final Results, Ta Chen placed the name, Anderson Alloys, on the public record. See Pl.'s Br. at 3 n. 6. In the Final Results, Anderson is referred to as "one of Ta Chen's US customers."

[18] [ ].

under which commissions were paid and how commission rates were determined.[19] Initial Questionnaire, at C-20, Def.'s App., Tab 1, at 8. Ta Chen responded that during the POR, it paid commissions to only one unaffiliated party.[20] Response to Initial Questionnaire, at 48-49, Def.'s App., Tab 2, at 6-7.

Commerce's conclusion that Ta Chen misreported commissions stems from questions which Commerce officials asked Robert Shieh, president of Ta Chen and TCI, during verification at TCI in June 1997. In connection with questions regarding TCI's sales process, verification officials asked Mr. Shieh to "discuss his involvement in sales of ... merchandise and the pricing methodology of TCI." Verification Report, at 5, Def.'s App., Tab 8, at 5. Mr. Shieh described his visits to various distributors during the POR, including one visit to one of Anderson Alloy's customers, Company C. The report goes on to state that:

> Mr. Shieh also clarified that prices between Anderson Alloys and [Company C] were negotiated by Anderson Alloys. In addition, he stated that there are times when Ta Chen has sold direct to [Company C]. During such instances, Ta Chen negotiated the price with [Company C]. Ta Chen would then pay Anderson Alloys a commission.

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[19] In order to calculate NV, the statute allows Commerce to account for certain differences in the circumstances of sales in the United States and foreign markets. See 19 U.S.C. § 677b(a)(6)(C)(iii) (1994). Pursuant to its regulations, Commerce makes circumstances of sale adjustments for direct selling expenses, including commissions. See, 19 C.F.R. § 351.410(b) & (c) (1999).

[20] [ ].

Id. There was no further discussion or elaboration of these sales at any point during verification.

In an internal memorandum, the case analyst stated that "newly-disclosed facts" were made at verification, pertaining to sales Ta Chen reported as being made to Anderson. "Ta Chen revealed for the first time that certain of these sales had, in fact, been made to yet another customer, [Company C], an entity which has never before been referenced in this administrative review." Analysis Memorandum for Final Results of 1994-1995 Ta Chen Review (July 1, 1997), at 2, C.R. Doc. 32, Def.'s App., Tab 9, at 2. This memorandum also characterized Mr. Shieh's comments as a statement that Anderson Alloys was a commissionaire on sales to Company C during the POR. Id. The memorandum further stated:

> [Ta Chen] deliberately misreported an unknown portion of its sales to Anderson .... Furthermore, Ta Chen stated affirmatively for the record that it paid commissions to one only U.S. commissionaire.... Prior to verification Ta Chen never indicated that it paid commissions to Anderson or to any other party, and Ta Chen's U.S. data do not reflect commission amounts on any of the sales Ta Chen identified as being to Anderson. Thus, Ta Chen failed not only to name Anderson as a commissionaire, but also failed to report the commissions it did pay to Anderson.

Id. at 3, Def.'s App., Tab 9, at 3 (emphasis in original).

After issuance of the Final Results, in which Commerce applied adverse facts available to Ta Chen's sales to Anderson, Ta Chen requested a correction of the Department's treatment of these sales, claiming that the conclusion that Ta Chen sold subject merchandise to Company C during the POR was a ministerial error.

Ministerial Error Submission (July 24, 1997), at 4, C.R. Doc. 34, Pl.s' Prop. App., Tab P, at 4.[21] Commerce did not, however, alter its conclusion that Ta Chen had misreported its sales to Anderson Alloys and failed to list Anderson as a commissionaire.

Discussion

Ta Chen argues that the conclusion that it misreported sales to Anderson Alloys, and failed to list Anderson as a commissionaire during the POR, is not supported by substantial evidence. Ta Chen insists that Mr. Shieh's comments regarding sales to Company C referred to sales made outside of the POR, and that Mr. Shieh was responding to questions regarding Ta Chen's sales history, not just sales during the POR. The Domestic Interested Parties counter that the verification was carried out to verify Ta Chen's sales information during the POR, so Commerce could legitimately interpret Mr. Shieh's statements as referring to sales which occurred during the POR.

The court agrees with Ta Chen that Commerce's conclusion is not supported by substantial evidence. As stated in the discussion section of Ta Chen's sales to Sun, substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp.*,

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[21] The July 24, 1997 submission was a re-submission of Ta Chen's July 17, 1997 submission alleging a ministerial error. Commerce determined that the July 17 submission contained new factual information, and therefore returned the document pursuant to 19 C.F.R. § 353.38(i) (1997). Commerce Letter Ruling (July 22, 1997), at 1, P.R. Doc. 103, Def.'s App., Tab 11, at 1. Ta Chen was permitted to resubmit its allegation of ministerial error without referencing the new information. Id.

340 U.S. at 477. The court does not substitute its own judgment for that of Commerce, but the court will not defer to a decision which is based on "inadequate analysis or reasoning." *USX Corp. v. United States*, 11 C.I.T. 82, 88, 655 F. Supp. 487, 492 (1987) (rejecting analysis of ITC where ITC did not fully analyze the issue). [HN16] "The absence of information necessary for a thorough analysis may render a determination unsupported by substantial evidence." Id. at 95, 655 F. Supp. at 498 (citation omitted).

Commerce's analysis that Ta Chen misreported its sales to Anderson is inadequate. There is no indication from the verification report that Commerce had any concerns regarding Ta Chen sales to Company C with commissions to Anderson. The Final Results do not elaborate any reason why the discussion at verification could justifiably lead to the conclusion that Mr. Shieh was referring to POR sales of subject merchandise. See *Final Results*, 62 Fed. Reg. at 37,544.

Mr. Shieh's statement during verification was made in response to questions regarding the history of Ta Chen's sales process. The introductory paragraph to this section of the verification report states that Ta Chen was to be "prepared to discuss the history of Ta Chen's efforts at selling pipe in the United States." Verification Report, at 4, Def.'s App., Tab 8, at 4. Mr. Shieh stated that "there are times when Ta Chen has sold direct to [Company C]. During such instances, Ta Chen negotiated the price with [Company C]. Ta Chen would then pay Anderson Alloys a commission." Id. at 5, Def.'s App., Tab 8, at 5 (emphasis added). This sole statement is not sufficient evidence for a conclusion that Ta Chen misreported its commissions when it was made in the context of Ta Chen's history of its sales in the United States, and where the verification report itself does not indicate that Mr. Shieh's statement was in any way problematic.

Ta Chen also emphasizes that it was provided with no opportunity to clarify Mr. Shieh's statement regarding sales to Company C. Commerce argues that verification is not the time to submit new information. See *Tatung Co. v. United States,* 18 C.I.T. 1137, 1142 n.3 (1994) (court accepted as reasonable "Commerce's position that allowing respondents who failed verification to re-submit new data, and requiring Commerce to re-verify this information would impose an undue burden on Commerce."); see also *Chinsung,* 13 C.I.T. at 106, 705 F. Supp. at 601-02 (stating that respondent bears the burden of creating an adequate record). Ta Chen, unlike the respondent in Tatung, did not fail verification. Indeed the verification report reflects that the Department did not find discrepancies in TCI's information. By comparison, the Department found "numerous errors and omissions" in the respondent's data during verification in *Tatung. Tatung,* 18 C.I.T. at 1138.

As stated in the discussion of Ta Chen's affiliation with Sun, Commerce has an obligation to "put parties on notice as to the deficiencies in their responses." *Usinor Sacilor, 19 C.I.T. at* 745, 893 F. Supp. at 1142. In Usinor, Commerce failed to give the plaintiffs notice that information was absent between the issuance of its preliminary and final results. The court held that this rendered Commerce's determination unsupported by substantial evidence and otherwise contrary to law. Id. at 745, 893 F. Supp. at 1141. In this case, Commerce's determination in the Final Results that Ta Chen had misreported sales to Anderson was a total surprise to Ta Chen. By failing to provide Ta Chen with an opportunity to comment on this allegation, Commerce based its conclusion on insufficient evidence and reasoning which the court will not uphold.

Given this record, the court concludes that the finding that Ta Chen misreported its sales to Anderson is not supported by substantial evidence. On remand, Commerce

must either provide Ta Chen an opportunity to submit evidence on the purported sales to Company C, in order for the Department to make a determination as to whether these sales were made during the POR, or Commerce must disregard the issue of misreported sales and undisclosed commissions to Anderson.

III. Application of adverse facts

Ta Chen contests the Department's application of adverse facts available, pursuant to 19 U.S.C. § 1677e (1994). Commerce applied adverse facts available to Ta Chen's misreported sales, i.e., its sales to Sun and Anderson. *Final Results*, 62 Fed. Reg. at 37,553. It did not base Ta Chen's margin on total adverse facts available, as requested by the Domestic Interested Parties. Id. Rather, Commerce applied partial adverse facts.

The Department concluded that an adverse inference was warranted because "Ta Chen failed to provide the Department with a complete and reliable listing of its U.S. sales," and that this amounted to a failure on Ta Chen's part to cooperate to the best of its ability. *Preliminary Results*, 62 Fed. Reg. at 1,436. Commerce stated further in the Final Results that, with regard to sales to Anderson, Ta Chen misreported these sales and failed to act to the best of its ability in this regard. *Final Results*, 62 Fed. Reg. at 37,544.

The court need not resolve the issue of whether the application of adverse facts available was warranted, in light of the fact that it is remanding this case to provide Ta Chen an opportunity to provide the Department with information on Sun's US sales and on Ta Chen's sales to Anderson Alloys.[22] Commerce will therefore have to recalculate the

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[22] The court also does not address Ta Chen's argument that the Department may not consider the respondent's level of

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dumping margin in light of this information and, depending on Ta Chen's cooperation on remand, may or may not find that an application of adverse facts available is warranted.

IV. Corroboration of the dumping margin

Commerce applied a 31.90 percent margin as partial adverse facts available to Ta Chen's sales to Sun and to Anderson. This margin was the highest rate from the initial LTFV investigation. *Preliminary Results*, 62 Fed. Reg. at 1,436; see also *Certain Welded Stainless Steel Pipe from Taiwan,* 57 Fed. Reg. at 62,301. This resulted in a weighted-average margin of 6.06 percent. *Final Results*, 62 Fed. Reg. at 37,556.

Ta Chen argues that Commerce failed to corroborate the margin in accordance with 19 U.S.C. § 1677e(c). In light of the court's instructions to Commerce on remand, however, the court need not determine whether the application of this margin was warranted, nor whether it was properly corroborated. The court also does not address Ta Chen's arguments that the margin was based on aberrant sales. Commerce will calculate a margin for Ta Chen based on its findings pursuant to this remand.

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cooperation in selecting substitute information when it applies partial adverse facts available. Pl.'s Br. at 41. The court does note that it has upheld the application of adverse facts to only a portion of a respondent's data. See *Toyota Motor Sales, U.S.A., Inc. v. United States,* 15 F. Supp. 2d 872, 882 (Ct. Int'l Trade 1998); *Ferro Union,* 74 F. Supp. 2d 1289, 1999 Ct. Intl. Trade LEXIS 116, 1999 WL 825584, at *7 (Ct. Int'l Trade 1999) (application of partial adverse facts available furthered goal of accuracy while maintaining adversity).

Conclusion

The court affirms Commerce's finding that Ta Chen and Sun Stainless are affiliated parties, as based on substantial evidence. Commerce erred, however, in applying facts available. On remand, Commerce will ask Ta Chen to provide information on Sun's US sales. The court also finds that Commerce's decision that Ta Chen misreported its sales to Anderson Alloys was not based on substantial evidence. On remand, Commerce will provide Ta Chen with an opportunity to explain whether the alleged sales to Company C occurred outside of, or during, the POR, or will disregard this issue.

Remand results are due within 60 days. Objections are due 20 days thereafter, responses 11 days thereafter.

Jane A. Restani

JUDGE

Dated: New York, New York, This 28th day of October, 1999

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 01-1048

TA CHEN STAINLESS STEEL PIPE, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee

ORDER

United States Court of Appeals
for the Federal Circuit

ORDER

A petition for rehearing en banc having been filed by the APPELLANT, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same herby is, DENIED.

The mandate of the court will issue on October 17, 2002.

FOR THE COURT,

/s/_____
Jan Horbaly
Clerk

Dated: October 10, 2002

cc: Joel Davidow

Supreme Court, U.S.
FILED
APR 7 2003
CLERK

No. 02-1141

In the Supreme Court of the United States

TA CHEN STAINLESS STEEL PIPE, LTD., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a determination by the United States Department of Commerce that petitioner "failed to cooperate by not acting to the best of its ability to comply with a request for information" in an antidumping proceeding, 19 U.S.C. 1677e(b), is supported by substantial evidence and otherwise in accordance with law.

2. Whether the Department of Commerce abused its discretion in calculating petitioner's antidumping duty.

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In the Supreme Court of the United States

No. 02-1141

TA CHEN STAINLESS STEEL PIPE, LTD., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 298 F.3d 1330. The opinion of the United States Court of International Trade (Pet. App. 38a-56a) is unreported. The determination of the Department of Commerce (Pet. App. 57a-75a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2002. A petition for rehearing was denied on October 10, 2002 (Pet. App. 116a-117a). On January 8, 2003, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 18, 2003. The petition was filed on January 21, 2003 (the day following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Tariff Act of 1930, 19 U.S.C. 1673, directs the Department of Commerce to impose remedial import duties if it determines that "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value" (*i.e.*, "dumped"), and the International Trade Commission finds that the imports are causing or threatening material injury to, or materially retarding the establishment of, a domestic industry. For purposes of that provision, the price at which an affiliate of a foreign exporter resells the exporter's merchandise in the United States is deemed to be the exporter's own price for sales in the United States. See 19 U.S.C. 1677a(a) and (b).

If, in an antidumping proceeding, the Department determines that material evidence is missing from the record because "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the [Department]," the agency "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. 1677e(b). That adverse-inference provision was enacted as part of the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, § 231(c), 108 Stat. 4896, by which Congress approved various trade agreements resulting from the Uruguay Round of multilateral trade negotiations. The congressionally approved Statement of Administrative Action that accompanied the URAA (see 19 U.S.C. 3512(d)) states:

> A party is uncooperative if it has not acted to the best of its ability to comply with requests for necessary information. Where a party has not

> cooperated, [the Department] * * * may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. In employing adverse inferences, one factor the agenc[y] will consider is the extent to which a party may benefit from its own lack of cooperation.

1 *Uruguay Round Trade Agreements*, H.R. Doc. No. 316, 103d Cong., 2d Sess. 870 (1994).

2. In 1992, the Department imposed antidumping duties after determining that welded stainless steel pipe imported from Taiwan was being sold at less than fair value. Pet. App. 77a. Petitioner was among the affected sellers of Taiwanese pipe. *Id.* at 78a.

In July 1994, during an annual administrative review of those antidumping duties (see 19 C.F.R. 353.22, 355.22(a) (1994)), the domestic steel industry alleged that petitioner was affiliated with other sellers of the Taiwanese pipe, including a distributor called Sun Stainless, Inc. (Sun). Pet App. 3a-4a. Petitioner denied any affiliation with Sun but submitted no evidence about the companies' relationship. *Id.* at 4a.

On January 1, 1995, the URAA's new, broader definition of an "affiliate" took effect. Pet. App. 4a. Under the URAA, unlike prior law (see 19 U.S.C. 1677(13) (1988)), a foreign exporter is deemed to be affiliated with customers it controls but does not own. See 19 U.S.C. 1677(33). Therefore, in accordance with 19 U.S.C. 1677a(a) and (b), sales by the controlled customers are attributed to the exporter for purposes of determining whether dumping has occurred.

In July 1995, the domestic steel industry submitted additional factual support for its assertion that petitioner and Sun were affiliated. Petitioner again denied the allegations. Pet. App. 4a. During that same month, Sun was sold to new owners. *Id.* at 41a.

In February 1996, the Department began its third annual review of antidumping duties on the Taiwanese pipe, covering the period December 1994 through November 1995. Pet. App. 77a-78a. The Department requested that petitioner identify and provide information about companies with which it was affiliated through means other than stock ownership. *Id.* at 65a-66a. In October 1996, the Department made a supplemental request for information in which it specifically asked petitioner to explain its relationship with Sun. *Id.* at 66a.

Based upon record evidence that included petitioner's response to the October 1996 questionnaire, the Department determined that petitioner and Sun were affiliates under the URAA's definition between January 1995 and July 1995, when Sun was sold. See Pet. App. 5a, 60a, 81a-82a, 86a-101a. The Department further concluded that it lacked material information about Sun's sales in the United States because petitioner had failed to respond to the Department's inquiries to the best of its ability. See *id.* at 40a. Pursuant to the adverse-inference provision of 19 U.S.C. 1677e(b), the Department assigned to petitioner's sales through Sun the highest dumping margin identified in the 1992 antidumping investigation. Pet. App. 47a.

3. The United States Court of International Trade affirmed the Department's determination that petitioner and Sun were affiliated during the 1994-1995 review period. Pet. App. 78a-101a. However, the court also determined that, before setting a dumping margin,

the Department should have given petitioner a further opportunity to provide information about Sun's sales in the United States. The court therefore remanded the case to the Department for a redetermination of petitioner's dumping margin on sales through Sun. *Id.* at 101a-107a, 113a-115a.

4. In November 1999, during proceedings on remand from the Court of International Trade, the Department issued a supplemental questionnaire to petitioner that sought information on Sun's sales in the United States. Pet. App. 41a. Petitioner responded that it was unable to provide the requested information because Sun had ceased operating in the United States and would not cooperate with the Department's investigation. *Id.* at 41a-42a. In its subsequent decision on remand, the Department again concluded that it lacked information about Sun's sales because petitioner had failed to act to the best of its ability to provide that information. See *id.* at 59a-61a, 63a-68a.

Although the Department had again found it appropriate to draw an adverse inference under 19 U.S.C. 1677e(b) because of petitioner's failure to provide data about Sun's sales, the Department changed its methodology for setting a dumping margin on those sales. The Department assigned to the pipe distributed by Sun the highest dumping margin that the Department calculated for any of petitioner's sales during the 1994-1995 review period. Pet. App. 62a. That change lowered the dumping margin on Sun's sales from approximately six percent (as calculated in the Department's first order) to 2.6%. *Id.* at 72a. The Department rejected petitioner's argument that the high-margin sale used to calculate the 2.6% margin was "aberrant" (*id.* at 70a), concluding instead that the sale was "indica-

tive of [petitioner's] customary selling practices" during the 1994-1995 review period. *Id.* at 62a.

The Court of International Trade affirmed the Department's determinations in the remand proceeding. Pet. App. 38a-56a.

5. The United States Court of Appeals for the Federal Circuit affirmed. Pet. App. 1a-37a. The court of appeals determined that petitioner's affiliation with Sun during the 1994-1995 review period, together with petitioner's awareness as early as 1994 that its relationship with Sun had been put at issue in the annual review proceedings, made it "reasonable in this case for [the Department] to expect [petitioner] to preserve its records" relating to Sun's sales. *Id.* at 10a. The court further determined that, when Sun—over which petitioner had operational control—was sold in 1995, petitioner "bore the risk that [the Department] would request the sales data previously alleged to be evidence of dumping activity." *Ibid.*

The court of appeals also determined that the Department did not abuse its discretion when, in the absence of the evidence that petitioner had failed to provide, it set petitioner's dumping margin for sales through Sun at a level equal to the highest dumping margin for any sale by petitioner during the 1994-1995 review period. Pet. App. 15a-18a. The court noted that the high-margin sale on which the Department relied was undisputed and corroborated by actual sales data. *Id.* at 15a-16a. The court further concluded that it was permissible for the Department to select that sale as the basis for its dumping-margin calculation. *Id.* at 16a-18a. It explained that, in light of petitioner's failure to provide sales data for its Sun affiliate, the Department could permissibly give consideration to the objective of deterring future noncompliance with antidumping

investigations when making an adverse inference under 19 U.S.C. 1677e(b), "so long as the rate chosen has a relationship to the actual sales information available." Pet. App. 17a.

Judge Gajarsa dissented. Pet. App. 19a-37a. In his view, petitioner was not required to "take affirmative steps to obtain information" about Sun's sales during the 1994-1995 review period, because that information had not yet been requested by the Department. *Id.* at 20a.

ARGUMENT

The decision of the court of appeals correctly applies settled law to the particular facts of this case. The decision in this case does not conflict with any decision of this Court or any court of appeals. Review by this Court therefore is not warranted.

1. The Department's antidumping determination must be upheld unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. 1516a(b)(1)(B). Petitioner's first argument (Pet. 13) is that the Department's determination that petitioner failed to cooperate (and thereby triggered the adverse-inference rule of 19 U.S.C. 1677e(b)) is not in accordance with law because it violates "international obligations" under the Uruguay Round Agreements. That argument is entirely misplaced. The Uruguay Round Agreements Act specifically provides that no private party may challenge government action "on the ground that such action or inaction is inconsistent with [the Uruguay Round Agreements]." 19 U.S.C. 3512(c)(1). Furthermore, 19 U.S.C. 2504(a) establishes that the provisions of specified trade agreements, including the antidumping agreement, shall not be given effect under United

States law if they "conflict with any statute of the United States." See generally *Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (per curiam) (noting that Congress has power to limit or override treaties by statute).

Petitioner also seeks to rely (Pet. 11-13) on the Statement of Administrative Action that accompanied the URAA and on World Trade Organization (WTO) decisions. The SAA is "an authoritative expression" of congressional intent in adopting the URAA, 19 U.S.C. 3512(d), and the WTO's interpretations of the Uruguay Round Agreements deserve "respectful consideration," *Breard*, 523 U.S. at 375. But neither the SAA nor the WTO decisions cast doubt on the correctness of the Department's determination to draw an adverse inference under 19 U.S.C. 1677e(b) in this case.

The SAA states that "[a] party is uncooperative if it has not acted to the best of its ability to comply with requests for necessary information." 1 *Uruguay Round Trade Agreements*, H.R. Doc. No. 316, 103d Cong., 2d Sess. 870 (1994). In this case, the Department, affirmed by the Court of International Trade and the court of appeals, determined that petitioner "failed to act to the best of its ability in responding to the Department's request for information regarding Sun's U.S. sales." Pet. App. 60a. Accordingly, petitioner's claim of inconsistency with the SAA implicates only the application of an uncontroverted legal standard to the specific facts of this case. That fact-bound issue, which the court of appeals correctly resolved in the Department's favor (*id.* at 10a-11a), does not warrant review by this Court.

Petitioner relies on WTO decisions for the proposition that a finding of non-cooperation should not be based on "failure to provide information not in that party's possession." Pet. 12-13. That supposed rule has no application to this case. The Department's determi-

nation of non-cooperation was supported by a finding, based on substantial evidence, that petitioner "had direct access to Sun's sales information" during the 1994-1995 review period. Pet. App. 67a; see *id.* at 64a (noting petitioner's "access to Sun's computer system containing its pricing information"), 81a- 83a (discussing petitioner's operational control over Sun). As the court of appeals explained, petitioner failed in 1995 to "preserve its records" about Sun's sales, despite earlier allegations of affiliation that put petitioner on notice that the Department might request the records. *Id.* at 10a. This is thus not a case in which a finding of non-cooperation is based upon only a failure to obtain records from another party. Moreover, petitioner does not suggest that the WTO has specifically addressed the significance, for a determination of non-cooperation, of a party's failure to preserve records that were within its control.

2. Petitioner also contends that the Department erred in its determination of the dumping margin for petitioner's sales through Sun. Petitioner asserts (Pet. 14-17) that the Department (i) lacked discretion to select the highest dumping margin for petitioner's documented sales during the relevant time period and (ii) was required to determine as closely as possible petitioner's actual dumping margin for sales made through Sun.

Petitioner overlooks that, once a failure to cooperate with the agency has been established as the predicate for an adverse inference under 19 U.S.C. 1677e(b), the Department may employ adverse inferences "to ensure that the party does not obtain a more favorable result by failing to cooperate than it would if it had cooperated fully." 1 H.R. Doc. No. 316, *supra*, at 870. Before adoption of the URAA, the Department had used ad-

verse inferences from available facts to discourage non-cooperation with antidumping investigations (*Allied-Signal Aerospace Co.* v. *United States*, 996 F.2d 1185, 1190-1192 (Fed. Cir. 1993)), and Congress intended that the URAA would be consistent with that agency practice. See 1 H.R. Doc. No. 316, *supra*, at 868-869.

The Department may use "any * * * information placed on the record" to fill the evidentiary gap created by a party's non-cooperation. 19 U.S.C. 1677e(b)(4). The Department therefore did not abuse its discretion when it assigned to petitioner's sales through Sun the highest dumping margin that the agency calculated for other sales by petitioner during the relevant time period. Indeed, petitioner's suggestion (Pet. 17 n.7) that the Department was required "to accurately calculate the dumping margin" insofar as the limited record evidence allowed, and to set the margin at that level, is flatly inconsistent with the Department's statutory authority to "use an inference that is adverse to the interests of [the non-cooperating] party in selecting from among the facts otherwise available," 19 U.S.C. 1677e(b). In setting petitioner's dumping margin, the Department was not required to proceed as if there had never been a determination that petitioner failed to cooperate with the Department's investigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

TA CHEN STAINLESS STEEL PIPE, LTD.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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On January 21, 2003, Petitioner Ta Chen Stainless Steel Pipe, Ltd. ("Ta Chen") filed a petition ("Petition") seeking certiorari review by this Court of a divided opinion of the Federal Circuit. In April 2003, the U.S. Government replied ("Gov't Br.") in a way that highlights "facts" that are neither fairly presented nor germane to the important questions presented here that the Government does not address.

I. The Majority Opinion Below Is Seriously Erroneous as a Matter of Trade and Administrative Law, With Major International Repercussions If Not Corrected, Warranting this Court's Review

The issue here warrants this Court's review because (a) the interpretation of trade statutes that allow tariff increases is of international importance, including as to U.S. trade and export interests, and (b) the decision below conflicts directly with rulings of this Court limiting the authority of judges to augment agency discretion in ways Congress did not statutorily authorize.

All agree that, in 1995, the Congress narrowed U.S. trade law to bring the United States into compliance with its international obligations. *See, e.g.*, Gov't Br. 2, 8. A stated priority of the United States was to build a world rule of law to ensure that other nations will not misuse their trade laws -- e.g., anti-dumping laws imposing anti-dumping duties on unfairly low priced (dumped) imports -- to the prejudice of U.S. exporters and the general belief that international application of rule of law principles is critical to world trade and economic development. Petition at 18. International trade now accounts for over a third of the total U.S. economy. Access to foreign markets and foreign goods are critical to the success of our way of life.

To that end, and pursuant to international agreement, the Congress narrowed the U.S. anti-dumping statute to provide that anti-dumping officials may impose duties for deemed unfairly low priced imports based on adversely estimated facts available (penalty duties) only if an exporter makes less than its best effort to answer a request for information from the U.S. Department of Commerce ("DOC") charged with administering the law. See 19 U.S.C. § 1677e(b), Uruguay Round Agreements Act ("URAA").[1] Accord: Gov't Br. at 2-3, 8.

It is undisputed (including in the Government's Brief in Opposition) and is the law of this case, that, at the time of DOC's request of Ta Chen for certain data of a customer of Ta Chen (Sun Stainless, Inc.), Ta Chen:

- did not have such data (the customer did),
- had done nothing to destroy it,
- had no affiliation with (or control over) the owner of the Sun data,
- could not obtain such data from the owner of the Sun data even using best efforts,
- could not have known in advance that the owner of the Sun data would not cooperate to provide it when asked to do so, and

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[1] Pub. L. 103-465, § 231(c), 108 Stat. 4896.

- until it was requested, reasonably did not think the data needed to be provided. It was only after a change in law and implementing clarifying regulation and DOC's explicit request that the need was clear.

Petition App. 5a-6a, 10a-12a, 19a, 24a-29a, 33a-34a, 58a-59a, 66a.

The Government argues that "imposing a duty to preserve" data prior to a request for it in a trade proceeding is compatible with the statutory language and purpose of the URAA. But, as noted above, that law states that best efforts to provide information must be used only in response to an actual request for information in a proceeding. The Government cites no contrary authority, as none exists. The Government does cite *Allied-Signal Aerospace Co.* v. *United States*, 966 F.2d 1185 (Fed. Cir. 1993). But that case, decided under *pre*-URAA law, merely held that DOC *then* had wide discretion to decide when to impose adverse inference tariff rates.

The Federal Circuit dissent by Judge Gajarsa below notes that the URAA language is not susceptible to the Government's interpretation. Petition App. 34a. As the dissent correctly states, the issue before this Court is novel -- i.e., judges ignoring the narrowed terms of a key U.S. trade statute designed to restrict the grounds on which to impose penalty tariffs in antidumping investigations. *Id.* As the dissent continues, the statute cannot be read to authorize penalty tariffs for failure to obtain and preserve documents of a third-party who was sold before such documents were even requested, with the new owner proving not cooperative. See Petition App. at 32a-33a. The Government never comes to terms with this argument in its brief in opposition.

The Government argues (Gov't Br. in Opp. at 7) that the decision below does not contravene rulings of this Court. In fact, it does. This Court has repeatedly held that a U.S. agency may not exploit statutory silence to exercise powers not given it. "An agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm. v. FCC*, 476 U.S. 355, 374 (1986). This Court stated "that [to] supply omissions [within a statute] transcends the judicial function." *W. Va. Hosps. Inc. v. Casey*, 499 U.S. 83, 101 (1991) (quoting *Iselin v. United States*, 270 U.S. 245, 250, 250-51 (1926)). The principles of the *La. Pub. Serv. Commn* and *W. Va. Hosp.* decisions apply to the enforcement of U.S. trade (e.g., anti-dumping) statutes. *FAG. Italia v. United States*, 291 F.3d 806, 816 (Fed. Cir. 2002).

An even stronger basis for Supreme Court review and discipline exists here than in the cases cited above. The U.S. statute authorizing DOC to impose penalty import tariffs was narrowed by Congress in the URAA in response to international criticism that DOC's discretion was too broad and unfettered, and was being abused for protectionist purposes (criticism effectively acknowledged in the Gov't Br. in Opp. at 2 & 8-9). Petition at 16-17.

Without statutory support, the Government assumes that a duty to preserve information in the possession of a third party can exist, and indeed, before there is a DOC request for the information. Moreover, the Government argues (at 6) the trade community (producers, exporters, traders and importers) should "bear the risk" that documents of those with whom they do business will be requested and may be unobtainable. The Government urges that the law compels those in the trade community to obtain and keep all records of third parties with whom they've done business, under threat of penalty tariffs should the information ever be

requested. The Government does not assert that a failure to do so has ever been recognized as justification for penalty duties.

As the dissent below stresses, not only is requiring such foresight unfair and unrealistic, the URAA does not make such risk shifting a ground for imposing penalty tariffs. The crucial fact is that the 1995 URAA does not say that penalty import tariffs may be imposed for failure to retain control of documents that, as here, might subsequently be deemed relevant due to a change in law and its application. It says only that *after* a request is made, it must be answered to the best of one's ability.

As to the second main issue of our Petition -- i.e., the selection of a penalty tariff rate -- the Government argues (at 6) that the penalty dumping margin for alleged sales below fair value selected is permissible because it is based on one fact in the record, plus adverse inferences from not providing requested information. Yet the Government ignores the URAA statutory requirement implementing U.S. international WTO obligations that use of penalty facts available must still be based on "probative" estimates based on the record as a whole as to the actual amount of dumping (i.e., sales below fair value). Petition at 13 & 15. The Government's position that these statutory requirements imposed by Congress may be ignored is wrong. Indeed, the Government admits (Gov't Br. 3, 9) that under the statute adverse inferences may be used only to the extent of insuring that a party does not get a more favorable result by not cooperating than by cooperating, effectively admitting that the adverse inference must consider reality as to the actual amount of dumping. Yet again, the Government and the lower courts depart from the rule of law Congress held to be key to the administration of U.S. trade laws and that Congress sought internationally from U.S. trading partners as

to the regulation of international trade, including U.S. exports.

Finally, the Government misconstrues our argument as to U.S. international WTO obligations. We are not claiming a WTO violation as a basis for our Petition, as the Government says on page 7. Rather, our argument is that U.S. statutory language intended to implement U.S. international WTO obligations -- i.e., a Congressional intent the Government admits on pages 2, 8 and 9 of its opposition -- is violated. The Government repudiates two centuries of doctrine of this Court beginning with *Alexander Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118 (1804), that, where possible, a statute must be construed to conform to the international obligations assumed by this country.

The record of the United States in international dispute resolution procedures of the WTO is a sorry one. Since the creation of that body in 1995, the United States has lost 22 out of the 25 cases brought by other countries against the United States and decided to date. Malawer, *The U.S. and the WTO, Lessons Learned for Trade Litigations and Global Governance*, Virginia Lawyer 12, 18 (April 2003). The majority of these adverse decisions turn on the United States' administration of its U.S. anti-dumping statute. *Id.* Nothing is more antithetical to WTO/GATT free trade principles than imposition of high tariffs as a punishment rather than a reflection of actual pricing patterns and rule of law principles. A decision of this Court is far more likely to have a sobering effect on American administrators and lower court judges than will the repeated negative findings of international WTO panels.

II. This Court Should Review Decisions Of The Federal Circuit Affecting International Trade Law.

When the Court of Appeals for the Federal Circuit ("CAFC") was created, commentators cautioned that it might become the "captive" of particular interests regularly appearing before the tribunal. A significant value of our Federal Judiciary, since its formation, has flowed from the fact that most of its judges have been "generalists" and, thereby, have shielded their decision-making from the special pleading of narrow interest groups. This Court's right and obligation to review the decisions of the Federal Circuit have been an important part of that tradition and a safety valve to assure the preservation of an even-handed process in the areas of the law in which the Federal Circuit is to exercise exclusive appellate jurisdiction.

Patent law is another significant specialty committed to the Federal Circuit's exclusive review. Since 1982, this Court has reviewed on average one Federal Circuit decision each year in that field. In fact, most decisions by this Court on patent law have been reversals of the views of the Federal Circuit. This history reflects the critical importance of the oversight by this Court of the exclusive jurisdiction of Federal Circuit in the areas of that court's competence.

This Court has not reviewed a single decision by the Federal Circuit that construes the U.S. trade (e.g., anti-dumping) statutes. The practice of non-review persists despite reports that, in its 20-year history, it is almost impossible to find a single decision of the Federal Circuit favorable to foreign parties claiming arbitrary or unjustified applications of the law to their businesses by the U.S. administrators. Ehrenhaft, *The Role of Federal Courts in U.S. Customs & International Trade Law,* The George

Washington Journal Of International Law And Economics, 323, 329 (No. 2, 1997-98). It is now time for this Court to exercise its oversight responsibilities and to accept a case in which it examines how U.S. trade law is implemented by the Executive Branch and is reviewed by the specialized courts Congress created to monitor the administration of these important statutes.

III. The Government's Other Claims are Contrary to the Statute and this Court's *Chenery* Decision.

Since it is conceded that Ta Chen used its best efforts to seek the data from the third-party (a customer) in issue after the DOC proceeding began and it was requested, the question is whether the courts below may give DOC authority not conferred by statute to impose penalty tariffs for failure to obtain data from a customer before its sale and before the investigative proceedings leading to the request for such data were even initiated. If the Court below had no right to expand the limited grounds for penalty tariffs set out in the statute, it is legally irrelevant to speculate whether sanctions were reasonable. Moreover, as the dissent explains, logic shows sanctions would have been unreasonable even if DOC had discretion to expand the new statutory scheme, because a duty to be prescient is unfair and unprecedented.[2]

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[2] *Cf. Pettibone v. United States*, 148 U.S. 199 (1893) (actions before proceeding began and request for information are not sanctionable); *Seabrook v. Stripling*, 736 F.2d 650, 654 (11th Cir. 1984) (sanctions not appropriate when third party refuses to cooperate). Moreover, research reveals no case allowing discovery sanctions where neither destruction of evidence nor refusal to seek it happened.

Ignoring the statutory focus on compliance with actual DOC requests for information, the Government merely argues that Ta Chen was on notice of what data to obtain from its then customer Sun at the time such data was allegedly available to Ta Chen, because Ta Chen was accused in 1994 by the private parties (i.e., the domestic industry) of being affiliated with Sun such that Sun's resale data should be provided, a claim Ta Chen denied. Gov't Br. at 4. As indicated, this argument is not relevant under the statutory scheme that focuses on when *DOC* requested the information.

In any event, as the Government admits, DOC never used this rationale to justify imposing penalty import duties on Ta Chen. Gov't Br. at 4, 6, 8. Rather DOC focused on when DOC itself first requested the data, as required by the statute. *Id.* It was the judges, not DOC, who came up with this rationale. The Government thereby acknowledges the lower courts' violation of this Court's rule in *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), that agency action must be defended in terms of the agency's stated rationale, not reasons supplied by overly helpful judges or counsel. It is undisputed that when *DOC* requested Sun's resale data, Sun's records were beyond Ta Chen's control and indeed Sun was closed. Petition App. 5a-6a, 10a-12a, 19a, 24a-29a, 33a-34a, 58a-59a, 66a.

CONCLUSION

Worldwide agreements lowering tariff and non-tariff trade barriers in order to promote world economic growth become meaningless if signatory nations fail to enact or to respect implementing legislation. Such agreements can be rendered equally meaningless if national courts "construe" implementing statutes to allow tariff raising under open ended standards. As Judge Gajarsa recognized in his dissent,

that is what will happen here, unless this Court exercises its supervisory authority to review and correct such judicial permissiveness.

Twenty years without review by this Court of U.S. trade laws have left the CAFC as the "Supreme Court" of trade law. The rules of law emerging from the WTO Uruguay Round necessitate that this Court remind the courts below that continued permissive deference to trade officials' discretion can eviscerate (a) efforts, including of the Congress, to impose a rule of law on international trade regulation and (b) key trade statutes designed to prevent selective reinstitution of high tariffs.

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